TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 480

LOUIS McNEESE, JR., A MINOR, BY MABEL McNEESE, HIS MOTHER AND NEXT FRIEND, ET AL., PETITIONERS,

vs.

BOARD OF EDUCATION FOR COMMUNITY UNIT SCHOOL DISTRICT 187, CAHOKIA, ILLINOIS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 3, 1962
CERTIORARI GRANTED DECEMBER 10, 1962

SUPREME COURT OF THE UNITED STATES

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., JANUARY 3, 1963

[fol. A]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13615

Appeal from the United States District Court for the Eastern District of Illinois. Honorable William G. Juergens, Judge Presiding.

LOUIS MCNEESE, JR., a minor, by Mabel McNeese, his mother and next friend, et al., Plaintiffs-Appellants,

vs.

BOARD OF EDUCATION FOR COMMUNITY UNIT SCHOOL DISTRICT NUMBER 187, CAHOKIA, ILLINOIS, et al., Defendants-Appellees.

Appellants' Appendix—Filed March 19, 1962

[fol. 1]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF ILLINOIS

Civil Action No. 4868

LOUIS MCNEESE, JR., a minor, by Mabel McNeese, his mother and next friend, et al., Plaintiffs,

vs.

BOARD OF EDUCATION FOR COMMUNITY UNIT SCHOOL DISTRICT NUMBER 187, etc., et al., Defendants.

STATEMENT UNDER RULE 16(b)—Filed October 6, 1961

1. This suit was instituted on September 12, 1961 upon and by the filing of the Complaint for Injunction and other relief, and a Motion for a Preliminary Injunction.

2. This is a class action filed on behalf of the named Plaintiffs and all other Negro children in Centreville, Illinois similarly situated, charging that the Defendants are maintaining and operating a racially segregated public school system.

3. On September 20, 1961, Defendants filed their Motion to Dismiss the Complaint and the Motion for Preliminary Injunction.

4. On October 6, 1961, Plaintiffs were given leave to file their Amended Complaint for Equitable Relief, and withdrew the Motion for Preliminary Injunction. Defendants extended their Motion to Dismiss to the Amended Complaint, and the Court, Honorable William G. Juergens, Judge, heard arguments of counsel.

[fol. 2] 5. On November 24, 1961, the Court allowed Defendants' Motion and ordered the dismissal of the Amended Complaint.

6. This appeal was taken by the filing of Notice of Appeal on December 22, 1961.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF ILLINOIS

AMENDED COMPLAINT FOR EQUITABLE RELIEF

Plaintiffs, by Clayton R. Williams and Rogers, Rogers, Strayhorn & Harth, their Attorneys, complaining of the Defendants, herein, allege as follows:

I.

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, 1343 (3), this being a suit in equity authorized by law, Title 42, United States Code, 1983, to be commenced by any citizen of the United States or other person within the jurisdiction thereof to redress the deprivation under color of statute, ordinance, regulation, custom or usage of a State of rights, privileges and immunities secured by the Consti-

tution and laws of the United States. The rights, privileges and immunities sought to be secured by this action, are rights, privileges and immunities secured by the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States, as hereinafter more fully appears.

II.

Plaintiffs in this action are all minors appearing by their parents and next friends. Plaintiffs are all citizens of the State of Illinois and of the United States, and are all residents and students in Community Unit School District [fol. 3] Number 187, St. Clair County, Illinois, and are all members of the Negro race.

III.

The questions which are the subject of this action are of common and general interest to all minors who are Negroes and who reside in and attend school in Community Unit School District, Number 187, St. Clair County, Illinois, Plaintiffs therefore bring this action on their own behalf and on behalf of all other Negro children and their parents in Centreville, Illinois who are similarly situated and affected by the policy, practice, custom and usage complained of herein.

IV.

The minor Plaintiffs herein and all other minor Negro children similarly situated are eligible to attend public elementary schools in Community Unit School District Number 187, which said schools are under the jurisdiction, management and control of the Defendants.

V.

The members of the class on behalf of which Plaintiffs sue, are so numerous as to make it impracticable to bring them all individually before this Court; but there are common questions of law and fact involved, common grievances arising out of common wrongs, and a common relief

is sought for each Plaintiff and each member of the class, and the Plaintiffs fairly and adequately represent the interests of the class.

VI.

The Defendants in this action are the Board Of Education for Community Unit School District Number 187, [fol. 4] (hereinafter referred to as "The Board"), a body politic, organized, existing, and operating under and by virtue of Chapter 122, Article 8, Illinois Revised Statutes, pursuant to an election heretofore duly held and conducted; Clarence D. Blair, County Superintendent of Schools for St. Clair County, Illinois, who was duly elected and is authorized to exercise the functions and perform the duties of that office, and who is actually in the exercise of such functions and the performance of such duties; and Robert F. Catlett, who is the duly appointed Superintendent of Schools for the aforesaid School District, and who was and is engaged in carrying out the functions and duties of that office.

VII.

The Defendants in this action are charged by the Laws of the State of Illinois with the duty of maintaining and operating a system of free public education in Community Unit School District Number 187, St. Clair County, Illinois, and are presently maintaining and operating public schools in the area or areas of their respective jurisdictions in purported pursuance of said laws. The Board has established and maintained within School District 187 free schools of different grades ranging from kindergarten through the twelfth grade, said schools being organized as elementary, junior high and high schools.

VIII.

The Defendants have adopted and pursued, and are presently pursuing a policy, custom and practice in assigning children to the elementary public schools of District 187 generally described as the "neighborhood school policy" or the "attendance area policy", whereunder children are

compelled to attend schools in the attendance areas in which they reside, and are not permitted to attend schools [fol. 5] in any other place, situation or location, except in certain special circumstances not applicable to these minor plaintiffs and the class on whose behalf they sue, and except as to certain fifth and sixth grade students who reside in the Centreville attendance area but who attend the Chenot School.

IX.

It is a matter of public knowledge that in Community Unit School District, Number 187, St. Clair County, Illinois, and elsewhere, Negroes perforce must reside within certain reasonably well-defined geographic confines, commonly known as ghettoes; that such ghettoes exist in said School District, and the Plaintiffs herein do, as members of the class on behalf of which Plaintiffs sue, live within the confines of such ghettoes.

X.

The existence of such ghettoes, as alleged, is and has been well known to the Defendants and each of them; and the boundaries of said ghettoes are and have been well known to the Defendants and each of them, and were well known to them at the time the boundaries of the attendance areas within said District were drawn.

XI.

Among the elementary schools in Community Unit School District 187 are the Chenot School and the Centreville School, and approximately four others, each such elementary school having its own attendance area.

XII.

Plaintiffs have been informed and so believe, and upon said information and belief state the fact to be that the [fol. 6] Chenot School, which was put into operation in the year 1957, was planned and built, and its attendance area boundaries were so drawn as to make it an exclusively Negro school in its student enrollment.

XIII.

That as a direct, proximate and foreseeable result of the Defendants' adoption and strict pursuance of the alleged "neighborhood school policy" or "attendance area policy", the Defendants have created and do maintain and operate racially segregated public elementary schools within Community Unit School District Number 187, and the minor Plaintiffs herein are compelled to attend school in such a racially segregated school by the acts of the Defendants herein, as follows:

A.

The Chenot School was put into operation in 1957. Prior thereto, Negro elementary school students residing in what is now the Chenot attendance area attended the Centreville School. However, said Negro children were perforce compelled to attend classes in the afternoon, exclusively while white children attended classes in the morning, exclusively, with the exception of certain slow white fifth and sixth grade students who attended classes all day.

B.

When the Chenot School was put into operation in 1957, all or practically all the children of elementary school age who resided in the Chenot attendance area were Negroes, a result intentionally achieved by the Defendants by the manner in which the Chenot attendance area boundaries were drawn, in pursuance of a plan to make Chenot School an all-Negro school in student enrollment.

[fol. 7]

C.

The Board, however, upon the opening of the Chenot School in 1957, because of overcrowded student enrollment in the adjacent Centreville School, transferred all fifth and sixth grade classes at Centreville School to Chenot School. These classes, consisted of approximately 97% white students and 3% Negro students. By directive of the Defendant Board, in pursuance of its design to maintain separate and racially segregated educational facilities for

Negro school children, or as nearly so separated and segregated as practicable, the said fifth and sixth grade classes, containing approximately 97% white students, were kept and maintained intact at the Chenot School, despite the fact that the children so involved were carried on the rolls as Chenot School students and their teachers as members of the Chenot School family.

D.

Since 1957, all fifth and sixth grade classes from Centreville School have been transferred to the Chenot School, and said classes have been kept and maintained intact while at the Chenot School.

E.

As a result of the above and foregoing, a situation of racially segregated and separate educational facilities was created and has been maintained by the Defendants; that a typical example of the results of the Defendants' said actions is indicated by the situation which prevailed at the Chenot School in the 1960-61 school year, when the following conditions existed:

1.

There were no white children of elementary school age residing in the Chenot attendance area, all said children [fol. 8] being Negroes, including the Plaintiffs herein and those on whose behalf this action is brought.

2.

Enrollment at the Chenot School consisted of 251 Negro students and 254 white students. All white students were in the fifth and sixth grade classes which were transferred from the Centreville School as aforesaid. Eight of the Negro students were in the fifth and sixth grade classes which were transferred from the Centreville School.

3.

There were a total of 18 classes at Chenot. Of these,

a) Ten classes had all Negro students.

b) Three classes had all White students.

c) One class had 3 Negro students, the remaining approximately 30 students being white.

d) One class had 2 Negro students, the remaining approximately 31 students being white.

e) Three classes had 1 Negro student each, the remaining approximately 85 students being white.

f) The seven Negro teachers on the faculty taught all-Negro classes exclusively.

g) Three white teachers taught all-Negro classes.

h) Three white teachers taught all-white classes.

i) Five white teachers taught the mixed classes referred to above.

j) No Negro teachers taught any white students.

k) The Negro students, with the exception of the eight who were in the classes transferred from Centreville School, attended classes located together in one part of the school building, separate and apart from the white students, and were further com- [fol. 9] pelled to use entrances to and exits from the school building separate from those used by the white students.

XIV.

Plaintiffs have been informed and so believe and upon such information and belief state the fact to be that all or substantially all of the above and foregoing conditions continue to exist at the Chenot School during the current school year.

XV.

The Defendants have failed and refused generally to desegregate the schools under their jurisdiction, but act in such a manner and fashion so as to perpetuate the system of segregated schools and facilities, created, maintained and operated by the Defendants contrary to and in direct conflict with the Constitution of the United States, despite requests, demands and pleas to the Defendants to cease and desist from their said unconstitutional acts as herein alleged.

XVI.

By reason of the "neighborhood school" or "attendance area policy" adopted and enforced by the Defendants as aforesaid, and as a result of the schemes, plans and contrivances of the Defendants in drawing the boundary lines of the attendance areas of the schools under their jurisdiction as aforesaid, in creating and maintaining racially segregated classes and separate educational facilities, the Defendants have created and are maintaining and operating racially segregated public elementary schools in Community Unit School District Number 187, St. Clair County, Illinois; and the minor Plaintiffs are assigned to and compelled to attend such a racially segregated school by the [fol. 10] acts of the Defendants herein; by reason thereof, Plaintiffs and all other Negro children similarly situated are denied by the Defendants the equal protection of the law and equal opportunity for education to which they are entitled by reason of the law. The actions of the Defendants violate the rights of the Plaintiffs and the members of their class which are secured to them by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

XVII.

Plaintiffs and the members of the class on whose behalf this action is brought, as a direct and proximate result of the Defendants' conduct as aforesaid in creating, producing, maintaining and operating segregated schools and educational facilities in their respective jurisdiction as afore-

said, and in requiring Plaintiffs and their said class to attend the same, suffer and sustain irreparable injury, and will continue to be irreparably harmed unless and until the unlawful acts of the Defendants are enjoined by this Court.

XVIII.

Any other relief to which the Plaintiffs and those similarly situated could be remitted would be attended by such uncertainties and delays as to deny to Plaintiffs the substantial relief to which they are entitled, would involve a multiplicity of suits, cause further irreparable injury, and occasion damage, vexation and inconvenience, not only to the Plaintiffs and those similarly situated, but also to the Defendants as public officials.

XIX.

Plaintiffs herein have not exhausted any administrative remedies provided by the laws of the State of Illinois for [fol. 11] the reason that the remedy there provided is inadequate to provide the relief sought by the Plaintiffs in this case.

Wherefore, Plaintiffs respectfully pray, on their own behalf and on behalf of all others similarly situated, as follows:

a.

That the Court enter a decree adjudging and declaring the "neighborhood school policy" or the "attendance area policy" in Community Unit School District Number 187, as employed by the Defendants herein, to be illegal and unconstitutional, and in violation of the rights of the Plaintiffs and others in their class as a violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

b.

That the Court enter a decree adjudging and declaring the maintaining of racially separated and segregated classes

and educational facilities at the Chenot Elementary School to be illegal and unconstitutional, and in violation of the rights of the Plaintiffs, and others in their class as a violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States.

c.

That the Court enter a decree enjoining and restraining the Defendants and each of them, their agents, employees, subordinates and successors, from requiring the minor Plaintiff children and others of their class to attend racially segregated public elementary schools in Community Unit School District Number 187.

[fol. 12]

d.

That the Court enter a decree enjoining and restraining the Defendants, their agents, employees, subordinates and successors, from maintaining racially separated and segregated classes and facilities at the Chenot Elementary School.

e.

That the Court enter a decree requiring the Defendants, and each of them, their agents, employees, subordinates and successors, to register the minor Plaintiff children in public elementary schools in Community Unit School District Number 187 that are racially integrated, pursuant to a plan which is practical and feasible for the purposes intended, to be submitted by the Defendants to this Court for approval, and further, requiring compliance by the Defendants therewith, all with due deliberate speed.

f.

That the Court allow the Plaintiffs and each of them, their costs herein, and further, grant them such other, additional or alternative relief as justice, equity and good conscience may require.

Clayton R. Williams and Rogers, Rogers, Strayhorn & Harth, By: Raymond E. Harth, Attorneys for Plaintiffs.

State of Illinois
County of St. Clair—ss.

Mabel McNeese, Charles Dickerson and Thelma Wade, being first duly sworn, on their respective oaths depose and state that they are the parents of the minor Plaintiffs in the above Complaint, and that the matters stated are true in substance and in fact. As to those matters al- [fol. 13] leged in said Complaint to be upon information and belief, Affiants verily believe said facts to be true.

Thelma Wade, Mabel McNeese, Charles Dickerson.

Subscribed and sworn to before me this 6th day of October, A.D., 1961.

My commission expires: July 7, 1962. Marian Elliott Kaase, Notary Public.

Clayton R. Williams and Rogers, Rogers, Strayhorn & Harth, Attorneys for Plaintiffs, 720A Belle Street, Alton, Illinois.

IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Illinois

* * (Caption—No. 4868) * *

MOTION OF DEFENDANT BOARD OF EDUCATION TO DISMISS COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION—Filed September 20, 1961

Defendant Board of Education moves the Court to dismiss the complaint and motion for preliminary injunction filed against it for the following reasons:

1. The complaint and motion do not state a claim upon, or a justiciable controversy in which, relief can be granted, in that, such pleadings contain no allegations of fact relating to the current school year, but contain only purported facts relating to the 1960-1961, and prior, school years.

[fol. 14] 2. The complaint and motion do not state a claim upon which relief can be granted, in that, plaintiffs have not, and do not allege that they have, as required, exhausted procedures under the law of the State of Illinois, whereas, there are now and were on the date of the filing of the complaint and motion several statutes providing remedies to persons aggrieved for the reasons complained of e.g., Section 22-19 of The School Code, (House Bill 609, approved July 31, 1961) a copy of which is attached hereto as Exhibit A.

3. Plaintiffs do not state a claim upon which relief can be granted with respect to any alleged discrimination in employment on account of color inasmuch as no rights of any of the plaintiffs secured by Amendment XIV to the Constitution of the United States or Title 42, Sections 1981 and 1983, of the United States Code are involved in said alleged discrimination.

4. Plaintiffs do not state a claim upon which relief can be granted with respect to the filing of any affidavits on the matter of the segregation of pupils on account of race, or discrimination in employment on such account, inasmuch as no rights of the plaintiffs secured by Amendment XIV to the Constitution of the United States or Title 42, Sections 1981 and 1983, of the United States Code are involved in said filings.

Wm. C. Dunham, Howard F. Boman, Attorneys for Defendant Board of Education.

Wm. C. Dunham, Howard F. Boman, First National Bank Building, East St. Louis, Illinois, BRidge 1-0535.

[fol. 15]

IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Illinois

• • (Caption—No. 4868) • •

ANSWER TO MOTION OF DEFENDANTS TO DISMISS

Come now the Plaintiffs, by Clayton R. Williams and Rogers, Rogers, Strayhorn & Harth, their attorneys, and in answer to the motion of the Defendants to dismiss, state as follows:

I.

Plaintiffs' Amended Complaint contains allegations as to facts and circumstances existing during current school year.

II.

Plaintiffs' action, being brought under Sec. 1983, Title 42, United States Code, need not be preceded by the exhaustion of any state remedies.

III.

The alleged state remedies referred to by the Defendants are neither administrative, adequate, or available to the Plaintiffs herein.

IV.

Allegations in Plaintiffs' Complaint concerning discrimination in employment of teacher personnel and filing of false affidavits are merely indicative of the pattern of discrimination carried on by the Defendants and therefore afford no basis for dismissal of the Complaint.

[fol. 16] V.

In support of this Answer, Plaintiffs attach hereto and make a part hereof their memorandum of points and authorities.

Clayton R. Williams and Rogers, Rogers, Strayhorn & Harth, By: Raymond E. Harth, 720 A Belle Street, Alton, Illinois, Attorneys for Plaintiffs.

IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Illinois

* * (Caption—No. 4868) * *

Filed November 24, 1961

ORDER DISMISSING COMPLAINT—November 22, 1961

The Court, having considered the respective motions of defendants Board of Education and Robert F. Catlett to dismiss the amended complaint, having heard oral arguments, and being fully advised in the premises, finds that the motions to dismiss the amended complaint should be allowed.

It Is, Therefore, The Order of this Court that the respective motions of defendants Board of Education and Robert F. Catlett to dismiss the amended complaint be and the same are hereby allowed and the plaintiffs' amended complaint is dismissed.

William G. Juergens, United States District Judge.

Dated: November 22, 1961

[fol. 17]

IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Illinois

• • (Caption—No. 4868) • •

Filed November 24, 1961

OPINION—November 22, 1961

Juergens, Judge

This class action was instituted by the minor plaintiffs, who appear by their parents and next friends. Plaintiffs are citizens of the State of Illinois and reside within the Eastern District of Illinois.

Jurisdiction is founded on Title 28, U.S.C.A., Section 1343(3), and authorized by Title 42, U.S.C.A., Section 1983.

The amended complaint alleges that the minor plaintiffs are all Negro children, are eligible to attend public elementary schools in Community Unit School District No. 187, which schools are under the management and control of defendants; that the members of the class in behalf of which plaintiffs sue are so numerous as to make it impracticable to bring them all individually before the Court, but there are common questions of law and fact involved, common grievances arising out of common wrongs, and common relief is sought for each plaintiff and each member of the class, and the plaintiffs fairly and adequately represent the interests of the class; that the defendants are presently maintaining and operating public schools in the area or areas of the respective jurisdictions in purported pursuance of the laws of the State of Illinois; that the defendants have adopted and pursued and are presently pursuing a policy, custom and practice in assigning chil-[fol. 18] dren to the elementary public schools in accordance with "neighborhood school policy" or "attendance area policy," where children are compelled to attend schools in the attendance areas in which they reside and are not permitted to attend schools in any other place except in certain special circumstances not applicable to these plain-

tiffs; that the Chenot School was put into operation in 1957 and was planned and built and its attendance area boundaries were so drawn as to make it an exclusively Negro school in its student enrollment; that as a direct, proximate and foreseeable result of the defendants' adoption and strict pursuance of the alleged "neighborhood school policy" or "attendance area policy", defendants have created and do maintain and operate racially segregated elementary schools and the minor plaintiffs are compelled to attend a racially segregated school by actions of the defendants herein; that prior to 1957 when the Chenot School was put into operation, Negro elementary school students residing in what is now the Chenot attendance area attended the Centreville School, where said Negro children were compelled to attend classes in the afternoon exclusively, while white children attended classes in the morning exclusively with the exception of certain slow white fifth and sixth grade students who attended classes all day; that when the Chenot School was put into operation, all or practically all of the children of elementary school age who resided in the Chenot attendance area were Negroes; that the manner in which the Chenot attendance areas were drawn resulted in making Chenot School an all Negro school in the student enrollment; that because of the crowded condition of the Centreville School, the Board of Education transferred all fifth and sixth grade classes at Centreville School to Chenot School; that these [fol. 19] classes consisted of approximately 97% white and 3% Negro students; that these classes were kept and maintained intact at the Chenot School despite the fact that the children so involved were carried on the rolls as Chenot students and their teachers as members of the Chenot faculty; that as a result of the above and foregoing a situation of racial segregation and separate educational facilities was created and has been maintained by the defendants; that the conditions created continue to exist; that the defendants have failed and refused to desegregate the schools under their jurisdiction but act in such a manner to perpetuate the system of segregated schools and facilities; that by reason of the "neighborhood school policy" or "attendance area policy" as adopted and enforced

by the defendants and as a result of the schemes, plans and contrivances of the defendants in drawing the boundary lines in the schools under their jurisdiction, the defendants have created and are maintaining and operating racially segregated public elementary schools in District No. 187 and the minor plaintiffs are assigned to and compelled to attend such racially segregated school by the acts of the defendants and consequently are denied the equal protection of law and equal opportunity for education to which they are entitled by reason of law; that requiring plaintiffs and their class to attend the segregated schools and educational facilities causes them to suffer and sustain irreparable injury and they will be irreparably harmed unless the defendants are enjoined by this Court; that any other relief to which plaintiffs could be remitted would be attended by such uncertainties and delays as to deny plaintiffs the substantial relief to which they are entitled; that plaintiffs have not exhausted any administrative remedies [fol. 20] provided by the laws of the State of Illinois for for the reason that the remedy there provided is inadequate to provide the relief sought by the plaintiffs. The plaintiffs pray that this Court enter an order adjudging and declaring the "neighborhood school policy" or "attendance area policy" as employed by the defendants to be illegal and unconstitutional and in violation of plaintiffs' rights and for other and further relief.

The Board of Education and Robert F. Catlett filed their motions to dismiss the complaint and motions for preliminary injunction. Thereafter, plaintiffs asked and were granted permission to file their amended complaint, the pertinent portions of which are above set out. They do not ask for a preliminary injunction in their amended complaint.

The Board of Education's and Robert F. Catlett's motions to dismiss the amended complaint are before the Court.

The question at this point is limited; it is one of procedure and not of substance; it is one of mere practice and not of merit.

At this juncture the question for the Court to determine is not whether the plaintiffs have been denied the equal

protection of the laws guaranteed to them by the Fourteenth Amendment but whether they have in the first instance proceeded in the proper manner for securing the remedies which have been provided (by the State of Illinois with an administrative review proceeding) in the event that their constitutional rights have been denied to them. [fol. 21] In support of their motions to dismiss the amended complaint, the Board of Education and Robert F. Catlett assert, among other things, that the plaintiffs have failed to exhaust the procedures provided under the laws of the State of Illinois, which provide remedies to persons aggrieved for the reasons complained of in the complaint.

Where a state law provides adequate administrative procedure for the protection of rights, the federal courts manifestly should not interfere with the operation of the schools until such administrative procedure has been exhausted and the intervention of the federal courts is shown to be necessary. *Parham* v. *Dove*, 8 Cir. 1959, 271 F. 2d 132. *Covington* v. *Edwards*, 4 Cir. 1959, 264 F. 2d 780.

Section 22-19, Chapter 122, Illinois Revised Statutes, 1961, provides as follows:

> "Sec. 22-19. Upon the filing of a complaint with the Superintendent of Public Instruction, executed in duplicate and subscribed with the names and addresses of at least 50 residents of a school district or 10%, whichever is lesser, alleging that any pupil has been excluded from or segregated in any school on account of his color, race, nationality, religion or religious affiliation, or that any employee of or applicant for employment or assignment with any such school district has been questioned concerning his color, race, nationality, religion or religious affiliation or subjected to discrimination by reason thereof, by or on behalf of the school board of such d 'rict, the Superintendent of Public Instruction shall ¡romptly mail a copy of such complaint to the secretary or clerk of such school board.
>
> "The Superintendent of Public Instruction shall fix a date, not less than 20 nor more than 30 days from [fol. 22] the date of the filing of such complaint, for a

hearing upon the allegations therein. He may also fix a date for a hearing whenever he has reason to believe that such discrimination may exist in any school district. Reasonable notice of the time and place of such hearing shall be mailed to the secretary or clerk of the school board and to the first subscriber to such complaint.

"The Superintendent of Public Instruction may designate an assistant to conduct such hearing and receive testimony concerning the situation complained of. The complainants may be represented at such hearing by one of their number or by counsel. Each party shall have the privilege of cross examining witnesses. The Superintendent of Public Instruction or the hearing officer appointed by him shall have the power to subpoena witnesses, compel their attendance, and require the production of evidence relating to any relevant matter under this Act. Any Circuit or Superior Court of this State, or any judge thereof, either in term time or vacation, upon the application of the Superintendent of Public Instruction or the hearing officer appointed by him, may, in its or his discretion, compel the attendance of witnesses, the production of books, papers, records or memoranda and the giving of testimony before the Superintendent of Public Instruction or the hearing officer appointed by him conducting an investigation or holding a hearing authorized by this Act, by an attachment for contempt, or otherwise, in the same manner as production of evidence may be compelled before said court. The Superintendent of Public Instruction or the hearing officer appointed by him may cause the depositions of witnesses within the State to be taken in the manner prescribed by law for like depositions in civil actions in courts of this State, and to that end compel the attendance of witnesses and the production of books, papers, records or memoranda. All testimony shall be taken under oath administered by the hearing of-
[fol. 23] ficer, but the formal rules pertaining to evidence in judicial proceedings shall not apply. The Superintendent of Public Instruction shall provide a com-

petent reporter to take notes of all testimony. Either party desiring a transcript of the hearing shall pay for the cost of such transcript. The hearing officer shall report a summary of the testimony to the Superintendent of Public Instruction who shall determine whether the allegations of the complaint are substantially correct. The Superintendent of Public Instruction shall notify both parties of his decision. If he so determines, he shall request the Attorney General to apply to the appropriate circuit court for such injunctive or other relief as may be necessary to rectify the practice complained of.

"The provisions of the 'Administrative Review Act,' approved May 8, 1945, and all amendments and modifications thereof and the rules adopted pursuant thereto shall apply to and govern all proceedings for the judicial review of any final decision rendered by the Superintendent of Public Instruction pursuant to this Section."

Plaintiffs assert that the remedy provided by the statute, hereinabove set out, does not provide an adequate procedure whereby plaintiffs may present their case for consideration before an administrative agency in that a judicial remedy is provided by the statute rather than an administrative remedy; that there is no individual right since it is required that there be 50 signatures on the complaint and further that notice is sent only to the first person on the petition; that there is no action in behalf of an individual but rather the action is in behalf of the State of Illinois and thus there is no right of counsel or redress of wrong by an individual.

[fol. 24] The plaintiffs' contention that an administrative remedy is not provided by the statute above is without merit. By the statute the Superintendent of Public Instruction or an assistant designated by him is charged with the responsibility of conducting a hearing to determine the validity of the complaint authorized to be filed under the statute. The complainants are specifically granted the right of representation by counsel and are further granted the privilege of cross examination.

The action instituted here is a class action, wherein the plaintiffs seek to have this Court enter a remedial order in favor of the entire class and in the words of the complaint the entire school area here involved is comprised of persons who it is alleged by the complaint are aggrieved and for whom relief is sought. Thus, it would appear that had the plaintiffs sought to obtain the signatures of a sufficient number of persons to proceed under the statute, there in all likelihood would have been little difficulty in obtaining the number of signatures required.

Plaintiffs, however, have not endeavored by any manner or means to attempt a proceeding under the statute but rather have elected to ignore the statute and thereby deprive the State of Illinois the opportunity to rectify its own wrong if it is found that one does exist.

It may well be that an attempt by plaintiffs to meet the requirements of the statute may be unsuccessful in that they may not be able to obtain a sufficient number of signatures on the complaint, or it may be impossible for plaintiffs to cause the Superintendent of Public Instruction to intercede on his own volition; yet, the Court is of the opinion that until the plaintiffs have attempted to avail themselves of the provisions that the administrative re- [fol. 25] view provides, they have failed to comply in the remotest manner with the administrative remedy provisions, and until at least an honest attempt is made to pursue that remedy, this Court should not interfere with the state authorities and deprive them of the opportunity to put their own house in order. Since the plaintiffs have failed to pursue or even attempt to pursue the administrative remedy provided, this Court should not entertain this cause of action.

The mere assertion by plaintiffs that the administrative review provided for under the laws of the State of Illinois is inadequate, without first having attempted to utilize that remedy, does not show this Court that the administrative review is in fact ineffective to produce the result attempted by the statute and desired herein by these plaintiffs.

The motions to dismiss the amended complaint will be allowed.

William G. Juergens, United States District Judge.

Dated: November 22, 1961

IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Illinois

* * (Caption—No. 4868) * *

NOTICE OF APPEAL—Filed December 21, 1961

Notice is hereby given that Louis McNeese, a minor, by Mabel McNeese, his mother and next friend, et al., Plain- [fol. 26] tiffs, herein, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the Order dismissing the above cause entered on November 24, 1961.

Rogers, Rogers, Strayhorn & Harth, and Clayton R. Williams, By: Raymond E. Harth, Attorneys for Plaintiffs.

Address for Service and Telephone: 69 W. Washington St., Suite 1600, Chicago 2, Illinois, RAndolph 6-9626.

[fol. 27]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13615

Appeal from the United States District Court for the Eastern District of Illinois. Honorable William G. Juergens, Judge Presiding.

LOUIS MCNEESE, JR., a Minor, by Mabel McNeese, His Mother and Next Friend, et al., Plaintiffs-Appellants,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT NUMBER 187, et al., Defendants-Appellees.

Appellees' Appendix—Filed April 19, 1962

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF ILLINOIS

MOTION OF DEFENDANT ROBERT F. CATLETT TO DISMISS COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION

* * * * * * *

1. The complaint and motion for preliminary injunction do not state a claim upon which relief can be granted because the rights referred to as being secured by Amend-
[fol. 28] ment XIV to the Constitution of the United States and Title 42, Sections 1981 and 1983 of the United States Code, are rights guaranteed against a state, and not against an individual, such as this defendant.

2. He adopts the grounds set forth in the motion of the defendant Board of Education to dismiss the complaint and motion for preliminary injunction.

* * * * * * *

[fol. 29]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13615

September Term, 1961—April Session, 1962

Appeal from the United States District Court for the Eastern District of Illinois.

LOUIS MCNEESE, JR., a minor, by MABEL MCNEESE, his mother and next friend,

and

ELOUISE DICKERSON, a minor, by CHARLES DICKERSON, her father and next friend,

and

BETTY WADE and JUDITH WADE, minors, by THELMA WADE, their mother and next friend,

and

For these and all others similarly situated and who may become parties to this action, Plaintiffs-Appellants,

v.

BOARD OF EDUCATION FOR COMMUNITY UNIT SCHOOL DISTRICT NUMBER 187, CAHOKIA, ILLINOIS,

and

CLARENCE D. BLAIR, County Superintendent of Schools for St. Clair County, Illinois,

and

ROBERT F. CATLETT, Superintendent of Schools for Community Unit School District Number 187, Cahokia, Illinois, Defendants-Appellees.

OPINION—July 5, 1962

[fol. 30] Before SCHNACKENBERG, CASTLE, and KILEY, Circuit Judges.

KILEY, Circuit Judge. This is a class suit on behalf of minor plaintiffs, and all others similarly situated, for redress of alleged deprivation, under color of Illinois law, of their rights to non-segregated public educational facilities in Community Unit School District No. 187, St. Clair County, Illinois.[1] The District Court dismissed the suit on defendants' motion. Plaintiffs have appealed.[2]

Plaintiffs are Negro elementary school students in the Chenot School in District No. 187, and all are residents of St. Clair County. The substance of their amended complaint is that before construction of the Chenot School in 1957 plaintiffs were compelled to attend the Centreville School in the District under a program which subjected them to discrimination because of their color; and that since 1957 the Chenot School has been maintained under a planned program of discrimination against them because of their color. They seek a decree declaring that the policies of District 187 are unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amend-

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[1] 42 U.S.C. §1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. §1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * * (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

[2] This court granted leave to the Chicago Board of Education to intervene as amicus curiae.

ment to the United States Constitution;[3] an injunction restraining defendants from maintaining their discriminatory policies; and a mandatory injunction requiring defendants to register plaintiffs in "racially integrated" public elementary schools in the District.

[fol. 31] The judgment of dismissal by the District Court was based on the ground that plaintiffs had "failed to comply in the remotest manner with" their administrative remedy under the Illinois School Code, Ill. Rev. Stat., 1961, ch. 122, §22-19. Plaintiffs contend that the judgment was erroneous because under the facts alleged in the amended complaint and admitted by defendants' motion they were not required to resort to the administrative remedy provided in the Illinois School Code; and that, in any event, that remedy is not administrative, but judicial and is inadequate. In their complaint they expressly state they have not exhausted the State remedy.

For the first contention they rely upon *Mannings* v. *Board of Public Instruction*, 5 Cir., 277 F.2d 370 (1960); *Borders* v. *Rippy*, 5 Cir., 247 F.2d 268 (1957); *Orleans Parish School Bd.* v. *Bush*, 5 Cir., 242 F.2d 156 (1957); *Bruce* v. *Stilwell*, 5 Cir., 206 F.2d 554 (1953); *Kelly* v. *Bd. of Ed. of City of Nashville*, 159 F. Supp. 272 (M.D. Tenn. 1958).

In *Mannings* the Board of Education had taken no affirmative steps under the *Brown* segregation cases[4] to effect the policy of desegregation. In *Borders* the Board admitted a policy which denied Negroes admittance to school because of color. In *Orleans* plaintiffs had exhausted their administrative remedy. The court nevertheless decided that pertinent Louisiana Constitution and statutory provisions were *per se* unconstitutional under the *Brown* cases. In *Bruce* it was admitted the Negro plaintiffs were denied admission to school because of color. In *Kelly* the court held the administrative power was

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[3] U. S. Const. amend. XIV, §1. "• • • No State shall • • • deny to any person within its jurisdiction the equal protection of the laws."

[4] *Brown* v. *Board of Education*, 347 U.S. 483 (1954) and related cases.

already "committed in advance to a continuation of compulsory segregation."

These cases are not helpful to plaintiffs because of the admission, in each of them, of the fact of discrimination on which the unconstitutionality of the laws and policies involved was determined. That is not true here. Plaintiffs assume as a premise that defendants' motion admitted that before and since 1957, defendants have maintained a racially segregated school system which deprived plaintiffs of "equal opportunity for education." The premise begs the question. Defendants' motion admits facts [fol. 32] well pleaded but does not admit the alleged conclusion[5] that the well pleaded facts resulted in discrimination against plaintiffs because of their color.

The amended complaint, so far as pertinent, alleges that the Negroes in District 187, including plaintiffs, were compelled to live in Negro "ghettoes." There is no allegation that this is due to any conduct of defendants. It is alleged that defendants had these "ghettoes" in mind when they made up the "attendance area policy" under which children in exclusively Negro areas are not permitted to attend schools in other areas. There is no allegation that the "attendance area policy" is unconstitutional *per se* as in the *Orleans* case or that the areas were not drawn consistently with an orderly administration of schools, in the light of the population facts as defendants found them, and in a constitutional manner. This distinguishes *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960) where the Alabama law redefining boundaries of the City of Tuskegee was plainly, deliberately designed to disenfranchise Negroes.

The amended complaint alleges that the Chenot School "attendance area" was planned and drawn so as to make it exclusively Negro. But it is not alleged that the area was not planned and drawn on a rational basis in a proper administrative function, or that it could or should have been planned or drawn otherwise. It is alleged that prior to 1957 Chenot area children attended Centreville School where they were required to attend afternoon classes while white children in the Centreville area were compelled to attend exclusively morning sessions. But it is

[5] 2 Moore, Federal Practice ¶12.08.

alleged that "certain slow white fifth and sixth grade" children attended classes all day and that since 1957 fifth and sixth grades from Centreville's overcrowded school, consisting of 3% Negro and 97% white students, attended Chenot School.

We think this analysis of the amended complaint is sufficient to distinguish the cases relied on by plaintiff. It is analogous to a statute which is not unconstitutional "on its face"; and it fails to allege a cause of action which justifies a failure to resort to administrative remedies. *Carson* v. *Warlick*, 4 Cir., 238 F.2d 724, cert. denied, 353 U.S. 910 (1956). Because the amended complaint does not allege school board policies which are unconstitutional in [fol. 33] themselves, plaintiffs are required to resort to the remedy held forth in the Illinois School Code before seeking the aid of a Federal Court. *Ibid.*; *Parham* v. *Dove*, 8 Cir., 271 F.2d 132 (1959).

The fact that this is a class suit attacking alleged segregation policies and that the *Carson* and other Fourth Circuit cases referred to by plaintiffs involved individual claims of denial of individual civil rights is of no consequence in our decision. The plaintiffs in their class suit are presenting claims based on the denial of civil rights of the individual members of the class represented in the suit. And the class action was a mere procedural vehicle by which the individual rights, common to all members of the class, were presented to the court. The basis of the claims of transgression of individual rights is the same in this case as in *Carson* and others to the same effect.

We see no merit to the plaintiff's contention that the remedy held out in the Illinois School Code is judicial rather than administrative and that therefore the rule of exhaustion of administrative remedy is inapplicable. In *Cook* v. *Davis*, 5 Cir., 178 F.2d 595 (1949) the school administrators had greater power to correct discrimination in teachers' salaries complained of there than the Superintendent of Public Instruction has under the Illinois School Code to correct the alleged unlawful conduct here. We think, nevertheless, we must apply to plaintiffs' contention here the reasons given by the court there in holding the State remedy administrative and not judicial: The Super-

intendent of Public Instruction in Illinois has no judicial power and his finding of fact as to whether segregation on account of race or color is being practiced in a school district is not binding in a suit at law or in equity; a complaint before him "may cause an adjustment" if there is substance to the allegations in that complaint; and his decision, when made, merely ripens the controversy for judicial action if needed. On this point plaintiffs are not aided by *Lane* v. *Wilson*, 307 U.S. 268 (1939). The pertinent issue there was whether plaintiff had to resort to the State Courts to "vindicate his grievance" of denial of franchise.

The final contentions made by plaintiffs are that the Illinois administrative remedy is not available to individuals since it must be initiated by a complaint signed by at least fifty persons; and that the remedy is inadequate because [fol. 34] the Superintendent of Public Instruction has no power himself to correct the discrimination if he finds it to exist. The requirement of fifty signatures is not in itself an unreasonable one, since the function of the requirement is similar to that of a class suit, that is, one of convenience and orderly procedure for presentation in a common cause many individual complaints instead of many individual particular causes. Also, defendants point out with force that the allegations of the complaint indicate that the School Code remedy would not practically be unavailable to plaintiffs. Furthermore, the School Code gives the Superintendent the power to initiate a hearing whenever he has reason to believe discrimination may exist in any school district. There is no claim that any individual in the class represented by plaintiffs requested the Superintendent to initiate a hearing. And, in practice, if an individual is denied the remedy he may then turn to the Federal Courts.

We must assume the administrative officials will do their duties under the School Code, *Carson* v. *Warlick*, 4 Cir., 238 F. 2d 724, 728, cert. denied, 353 U.S. 910 (1956), and it is generally accepted in the cases[6] that Federal Courts should not interfere with a State's operation and administration of its schools, nor with the performance of adminis-

[6] *E.g.*, *Parham* v. *Dove*, 8 Cir., 271 F.2d 132 (1959); *Carson* v. *Warlick*, 4 Cir., 238 F.2d 724, cert. denied, 353 U.S. 910 (1956).

trative duties, in the absence of necessity, until administrative remedies have been exhausted.

For the reasons given, we hold that the District Court did not err in "dismissing" plaintiffs' suit on the ground that plaintiffs had not resorted to their administrative remedy under the Illinois School Code.

The judgment of the District Court is Affirmed.

A true Copy:

Teste:

....., Clerk of the United States Court of Appeals for the Seventh Circuit.

[fol. 35]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Before

Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Latham Castle, Circuit Judge.
Hon. Roger J. Kiley, Circuit Judge.

No. 13615

Appeal from the United States District Court for the Eastern District of Illinois.

LOUIS MCNEESE, JR., a minor, by Mabel McNeese, his mother and next friend, et al., Plaintiffs-Appellants,

vs.

BOARD OF EDUCATION FOR COMMUNITY UNIT SCHOOL DISTRICT NUMBER 187, CAHOKIA, ILLINOIS, et al., Defendants-Appellees.

JUDGMENT—July 5, 1962

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

[fol. 36] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 37]

SUPREME COURT OF THE UNITED STATES

No. 480, October Term, 1962

LOUIS McNEESE, JR., a minor, by Mabel McNeese, his mother and next friend, et al., Petitioners,

vs.

BOARD OF EDUCATION FOR COMMUNITY UNIT SCHOOL DISTRICT 187, Cahokia, Illinois, et al.

ORDER ALLOWING CERTIORARI—December 10, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962.

No. 480

LOUIS McNEESE, JR., a minor, by Mabel McNeese, his mother and next friend, et al.,

Petitioners,

vs.

BOARD OF EDUCATION FOR COMMUNITY UNIT SCHOOL DISTRICT 187, CAHOKIA, ILLINOIS, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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List Of Authorities Cited

Cases:

Statutes Cited:

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962.

No. _____

LOUIS McNEESE, JR., a minor, by Mabel McNeese, his mother and next friend, et al.,

Petitioners,

vs.

BOARD OF EDUCATION FOR COMMUNITY UNIT SCHOOL DISTRICT 187, CAHOKIA, ILLINOIS, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Petitioners, Louis McNeese, Jr., et al., minors, by their parents and next friends, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled cause on July 5, 1962.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals, reprinted in Appendix A hereto, is reported at 305 F. 2d 783 (1962). The opinion of the District Court, reprinted in Appendix B, is reported at 199 F. Supp. 403.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 5, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

1. Whether the Plaintiffs, in a class action in a school segregation case brought under the Civil Rights Act, R.S. §1979, are to be denied the right to have a Federal District Court enjoin a local board of education, acting under color of law, from continuing to operate the local public school system on a racially segregated basis, solely because the individual plaintiffs have not exhausted alleged "administrative remedies" provided by a state statute.

2. Whether plaintiffs, in such a case, are required to exhaust state *judicial* remedies before bringing suit in a Federal District Court to remedy the grievances complained of.

3. Whether the state statute in question provides a judicial or an administrative remedy, or any remedy at all, and if so,

a. Is the remedy *available* to an injured party?

b. Is the remedy *adequate* to provide full and complete relief for the plaintiffs' complaints?

STATUTES INVOLVED.

Title 42 U. S. Code, Sec. 1983:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 28 U. S. Code §1343(3):

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> • • •
>
> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, or of any right, privilege or immunity secured by the Constitution of the United States or by any Acts of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Illinois Revised Statutes 1961, Ch. 122, Sec. 22-19:

> The provisions of this, the state statute in question, are reprinted in Appendix C to this Petition.

STATEMENT.

Petitioners brought this action in the United States District Court for the Eastern District of Illinois under the Civil Rights Act (42 U.S.C. 1983), seeking a declaratory judgment and an injunction to restrain the defendants from requiring plaintiffs to attend racially segregated public elementary schools in Centreville, a city located in Southern Illinois. Jurisdiction was based on Title 28, U.S.C. §1343(3). On November 22, 1961, the District Court dismissed the Plaintiffs' Amended Complaint for failure of the Plaintiffs to pursue a certain alleged "administrative remedy" provided by an Illinois statute. On July 5, 1962, the Court of Appeals affirmed, for the same reason.

The Amended Complaint alleged:

Plaintiffs are minor Negro children who attend school at Chenot Elementary School, located in School District 187, St. Clair County, Illinois. (App. 3)

Prior to 1957, Negro children residing in the Chenot school attendance area attended separate segregated classes at the Centreville Elementary School. They were required to attend classes in the afternoons while white pupils attended classes in the mornings. (App. 6)

The Chenot school, which was opened in 1957, was planned and built, and its attendance area lines were so drawn, in accordance with a so-called "neighborhood school policy," as to make it an exclusively Negro school in its student enrollment. (App. 6)

Because of overcrowding in the adjacent Centreville Elementary School, all fifth and sixth grade students, 97%

of whom were white, were transferred to the Chenot school. (App. 7)

The Defendants maintained and are maintaining separate classes for white and Negro students in the Chenot school. (App. 7)

Negro students at the Chenot school attended classes in one part of the building while white students attended classes in another. Negro students were required to use entrances and exits separate from those used by white students. (App. 8, 9)

Negro teachers on the faculty were assigned to teach all-Negro classes exclusively. While some white teachers taught some Negro pupils, no Negro teachers were assigned to teach any white pupils. (App. 8)

Defendants have used the "neighborhood school policy", and have intentionally drawn the boundaries of the attendance areas of the schools in such a manner that Plaintiffs are compelled to attend racially segregated schools, and have maintained separate classes for white and Negro students, thereby depriving Plaintiffs of due process of law and equal protection of the laws contrary to the Constitution of the United States. (App. 9, 10)

REASONS FOR GRANTING THE WRIT.

1. The decisions of the Courts below directly conflict with the decisions in the Fifth Circuit as to the necessity for exhausting administrative remedies. See *Mannings* v. *Bd. of Public Instr.*, 277 F. 2d 370 (1960); *Borders* v. *Rippy*, 247 F. 2d 268 (1957); *Orleans Parish School Bd.* v. *Bush*, 242 F. 2d 156 (1957); *Gibson* v. *Bd. of Public Instr.*, 246 F. 2d 913 (1957) and 272 F. 2d 763 (1959); *Holland* v. *Bd. of Public Instr.*, 258 F. 2d 730 (1958); *St. Helena Parish School Board* v. *Hall*, 287 F. 2d 376 (1961); and *Bruce* v. *Stilwell*, 206 F. 2d 554 (1953). These cases have consistently held that in cases of this nature brought under the Civil Rights Act, the exhaustion of state administrative remedies is not a prerequisite to filing a suit in a Federal District Court to enjoin the maintenance of a racially segregated public school system. In the *Mannings* case, precisely the same issue was before the Court as in this case. There the Court stated (277 F. 2d at page 372):

> "• • • The following issue is presented: Are the plaintiffs in a class action in a school segregation case, denied the right to have the trial court enjoin a local board of education from continuing to operate the local school system on a racially segregated basis, solely because the individual plaintiffs have not exhausted administrative remedies made available to them to seek admission to certain designated schools?"

The Fifth Circuit has consistently answered that question in the negative. The decisions below answer it affirmatively. Plaintiffs' Amended Complaint would have been sustained in the Fifth Circuit.

2. No Supreme Court case has ever dealt with the necessity for exhausting state administrative remedies in

a school segregation case filed under the Civil Rights Act. Consequently, the lower courts are in conflict and confusion on this question.

As stated previously, the Fifth Circuit has consistently held that the exhaustion of such remedies is unnecessary. The decisions below in this case are in line with certain cases in the Fourth Circuit which have held that the exhaustion of state administrative remedies is necessary in cases such as the one at bar. See *Carson* v. *Warlick*, 238 F. 2d 724 (1956); *Carson* v. *Bd. of Ed.*, 227 F. 2d 789 (1955); *Hood* v. *Bd. of Trustees*, 232 F. 2d 626; *Covington* v. *Edwards*, 264 F. 2d 780 (1959); *Holt* v. *Raleigh City Bd. of Ed.*, 265 F. 2d 95 (1959). On the other hand, another of the Fourth Circuit cases has held that the exhaustion of administrative remedies is not necessary. *Carter* v. *School Bd. of Arlington County*, 182 F. 2d 531 (1950). There the Court said, (p. 536):

> "• • • Nor can it be said that a scholar who is deprived of his due must apply to the administrative authorities and not to the courts for relief. An injured person must of course show that the state has denied him advantages accorded to others in like situations, but when this is established, his right of access to the courts is absolute and complete."

To add further to the confusion, the Eighth Circuit has taken a middle ground. In *Parham* v. *Dove*, 271 F. 2d 132, the Court remanded the case to the District Court and directed that the individual plaintiffs exhaust their administrative remedies (under the Arkansas Pupil Placement Act.) But, the Court further directed the District Court to enter an immediate injunction to restrain the defendants from maintaining a racially segregated school system, and to retain jurisdiction until the individual plaintiffs had exhausted their administrative remedies to determine whether further action was necessary.

As a result of this confusion it is impossible for attorneys to predict whether their cases may properly be filed under the Civil Rights Act without exhausting state administrative remedies. Title 28 U. S. Code §1343(3), which gives the district courts "original jurisdiction of any civil action authorized by law to be commenced • • • to redress the deprivation, under color of any state law, • • • of any right, privilege or immunity secured by the Constitution of the United States or by any acts of Congress providing for equal rights of citizens • • •", contains no limitation such as has been imposed by the Seventh and Fourth Circuits. The Civil Rights Act is rendered largely ineffective in this area while costly and time-consuming litigation on threshold issues of jurisdiction and pleading proliferates.

3. The decisions below conflict with the decisions of this Court in *Monroe* v. *Pape*, 365 U.S. 167 and with *Lane* v. *Wilson*, 307 U.S. 274.

These two cases have firmly settled the issue that state judicial remedies need not be exhausted before a Federal suit may be instituted under the Civil Rights Act. In this case, whatever remedy as may be provided by the Illinois statute in question is *judicial* and not administrative as defendants contend. That statute (Illinois Revised Statutes 1961, Ch. 122, Sec. 22-19) provides in substance as follows:

a. There must be a petition signed by at least 50 persons alleging that racial discrimination exists in a school district.

b. The State Superintendent of Public Instruction then conducts a hearing for the sole purpose of determining whether the allegations of the petition are "substantially correct."

c. If he makes such a determination, he has no power or authority under the Act to give any remedy.

He can issue no cease and desist orders. He can not correct the discrimination he may have found to exist. The only action he can take is to request the State Attorney General to file a suit in a State court.

The remedy, therefore, if any, is not administrative, but judicial, thereby bringing this case squarely within the rule of *Monroe* v. *Pape* and *Lane* v. *Wilson*. If the Courts below had followed the rulings of this Court in those cases, Petitioners' Amended Complaint would have been sustained.

4. The decisions below conflict with the decision of this Court in *U. S. Alkali Ass'n.* v. *U. S.*, 325 U.S. 196 (1944). That case involved Section 5 of the Webb-Pomerene Act, which is similar in many respects to the Illinois Statute under consideration. It provides that if the Federal Trade Commission believes that a trade association is acting in restraint of trade, it should summon the association to appear before it, and conduct an investigation into alleged violations of law. If it concludes that the law has been violated, it shall *recommend* to the association adjustments in its practices, and if the association does not comply, then it shall refer its findings to the Attorney General of the United States for "such action thereon as he may deem proper." The Government filed a suit against the Association charging violation of the Sherman Act. No hearing was held under Sec. 5 of the Webb-Pomerene Act. The Association contended that the authority of the Government to sue was suspended until the Federal Trade Commission had proceeded by way of investigation, recommendation and reference to the Attorney General, and moved to dismiss the complaint. In affirming the lower court's refusal to dismiss the complaint, this Court said (325 U.S. 210):

"Petitioners appeal to the familiar principle that equity will not lend its aid to a plaintiff who has not first exhausted his administrative remedies. • • • *To*

> ***this the answer is, as already indicated, that the only function of the Federal Trade Commission under Section 5 of the Webb-Pomerene Act is to investigate, recommend and report. It can give no remedy. It can make no controlling finding of law or fact. Its recommendations need not be followed by any court or administrative or executive officer.*** (Emphasis ours)

Similarly, under the Illinois statute under consideration, the State Superintendent can merely conduct a hearing, make a finding and *request* the State Attorney General to institute an action in a state court. He can give no remedy. His request to the Attorney General need not be complied with.

Had the Court below followed the decision in the *U. S. Alkali Ass'n.* case, Plaintiffs' Amended Complaint would have been sustained.

CONCLUSION.

There is a conflict between the Circuits. The lower courts are in confusion. The leading Supreme Court cases have been rejected or ignored below. Protection of the Constitutional rights of Petitioners and others similarly situated is being unreasonably delayed by procedural and jurisdictional disputes.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN W. ROGERS,
EARL E. STRAYHORN,
Attorneys for Petitioners.

RAYMOND E. HARTH,
CHARLES H. JONES, JR.,
CLAYTON R. WILLIAMS,
Of Counsel.

APPENDIX A.

Opinion Of The United States Court Of Appeals For The Seventh Circuit

No. 13615 September Term, 1961 April Session, 1962

Louis McNeese, Jr., a minor, by Mabel McNeese, his mother and next friend, et al.,
Petitioners,
vs.
Board of Education for Community Unit School District Number 187, Cahokia, Illinois, et al.,
Respondents.

Appeal from the United States District Court for the Eastern District of Illinois.

July 5, 1962

Before SCHNACKENBERG, CASTLE, and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is a class suit on behalf of minor plaintiffs, and all others similarly situated, for redress of alleged deprivation, under color of Illinois law, of their rights to non-segregated public educational facilities in Community Unit School District No. 187, St. Clair

County, Illinois.[1] The District Court dismissed the suit on defendants' motion. Plaintiffs have appealed.[2]

Plaintiffs are Negro elementary school students in the Chenot School in District No. 187, and all are residents of St. Clair County. The substance of their amended complaint is that before construction of the Chenot School in 1957 plaintiffs were compelled to attend the Centreville School in the District under a program which subjected them to discrimination because of their color; and that since 1957 the Chenot School has been maintained under a planned program of discrimination against them because of their color. They seek a decree declaring that the policies of District 187 are unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;[3] an injunction

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[1] 42 U.S.C. §1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. §1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * * (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

[2] This court granted leave to the Chicago Board of Education to intervene as amicus curiae.

[3] U. S. Const. amend. XIV. §1. "* * * No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

restraining defendants from maintaining their discriminatory policies; and a mandatory injunction requiring defendants to register plaintiffs in "racially integrated" public elementary schools in the District.

The judgment of dismissal by the District Court was based on the ground that plaintiffs had "failed to comply in the remotest manner with" their administrative remedy under the Illinois School Code, Ill. Rev. Stat., 1961, ch. 122, §22-19. Plaintiffs contend that the judgment was erroneous because under the facts alleged in the amended complaint and admitted by defendants' motion they were not required to resort to the administrative remedy provided in the Illinois School Code; and that, in any event, that remedy is not administrative, but judicial and is inadequate. In their complaint they expressly state they have not exhausted the State remedy.

For the first contention they rely upon *Mannings* v. *Board of Public Instruction*, 5 Cir., 277 F.2d 370 (1960); *Borders* v. *Rippy*, 5 Cir., 247 F.2d 268 (1957); *Orleans Parish School Bd.* v. *Bush*, 5 Cir., 242 F.2d 156 (1957); *Bruce* v. *Stilwell*, 5 Cir., 206 F.2d 554 (1953); *Kelly* v. *Bd. of Ed. of City of Nashville*, 159 F. Supp. 272 (M.D. Tenn. 1958).

In *Mannings* the Board of Education had taken no affirmative steps under the *Brown* segregation cases[4] to effect the policy of desegregation. In *Borders* the Board admitted a policy which denied Negroes admittance to school because of color. In *Orleans* plaintiffs had exhausted their administrative remedy. The court neverthe-

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[4] *Brown* v. *Board of Education*, 347 U.S. 483 (1954) and related cases.

less decided that pertinent Louisiana Constitution and statutory provisions were *per se* unconstitutional under the *Brown* cases. In *Bruce* it was admitted the Negro plaintiffs were denied admission to school because of color. In *Kelly* the court held the administrative power was already "committed in advance to a continuation of compulsory segregation."

These cases are not helpful to plaintiffs because of the admission, in each of them, of the fact of discrimination on which the unconstitutionality of the laws and policies involved was determined. That is not true here. Plaintiffs assume as a premise that defendants' motion admitted that before and since 1957, defendants have maintained a racially segregated school system which deprived plaintiffs of "equal opportunity for education." The premise begs the question. Defendants' motion admits facts well pleaded but does not admit the alleged conclusion[1] that the well pleaded facts resulted in discrimination against plaintiffs because of their color.

The amended complaint, so far as pertinent, alleges that the Negroes in District 187, including plaintiffs, were compelled to live in Negro "ghettoes." There is no allegation that this is due to any conduct of defendants. It is alleged that defendants had these "ghettoes" in mind when they made up the "attendance area policy" under which children in exclusively Negro areas are not permitted to attend schools in other areas. There is no allegation that the "attendance area policy" is unconstitutional *per se* as in the *Orleans* case or that the areas were not drawn consistently with an orderly administra-

[1] 2 Moore, Federal Practice ¶12.08.

tion of schools, in the light of the population facts as defendants found them, and in a constitutional manner. This distinguishes *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960) where the Alabama law redefining boundaries of the City of Tuskegee was plainly, deliberately designed to disenfranchise Negroes.

The amended complaint alleges that the Chenot School "attendance area" was planned and drawn so as to make it exclusively Negro. But it is not alleged that the area was not planned and drawn on a rational basis in a proper administrative function, or that it could or should have been planned or drawn otherwise. It is alleged that prior to 1957 Chenot area children attended Centreville School where they were required to attend afternoon classes while white children in the Centreville area were compelled to attend exclusively morning sessions. But it is alleged that "certain slow white fifth and sixth grade" children attended classes all day and that since 1957 fifth and sixth grades from Centreville's overcrowded school, consisting of 3% Negro and 97% white students, attended Chenot School.

We think this analysis of the amended complaint is sufficient to distinguish the cases relied on by plaintiff. It is analogous to a statute which is not unconstitutional "on its face"; and it fails to allege a cause of action which justifies a failure to resort to administrative remedies. *Carson* v. *Warlick*, 4 Cir., 238 F.2d 724, cert. denied, 353 U.S. 910 (1956). Because the amended complaint does not allege school board policies which are unconstitutional in themselves, plaintiffs are required to resort to the remedy held forth in the Illinois School Code before seek-

ing the aid of a Federal Court. *Ibid*; *Parham* v. *Dove*, 8 Cir., 271 F.2d 132 (1959).

The fact that this is a class suit attacking alleged segregation policies and that the *Carson* and other Fourth Circuit cases referred to by plaintiffs involved individual claims of denial of individual civil rights is of no consequence in our decision. The plaintiffs in their class suit are presenting claims based on the denial of civil rights of the individual members of the class represented in the suit. And the class action was a mere procedural vehicle by which the individual rights, common to all members of the class, were presented to the court. The basis of the claims of transgression of individual rights is the same in this case as in *Carson* and others to the same effect.

We see no merit to the plaintiffs' contention that the remedy held out in the Illinois School Code is judicial rather than administrative and that therefore the rule of exhaustion of administrative remedy is inapplicable. In *Cook* v. *Davis*, 5 Cir., 178 F.2d 595 (1949) the school administrators had greater power to correct discrimination in teachers' salaries complained of there than the Superintendent of Public Instruction has under the Illinois School Code to correct the alleged unlawful conduct here. We think, nevertheless, we must apply to plaintiffs' contention here the reasons given by the court there in holding the State remedy administrative and not judicial: The Superintendent of Public Instruction in Illinois has no judicial power and his finding of fact as to whether segregation on account of race or color is being practiced in a school district is not binding in a suit at law or in equity; a complaint before him "may cause an adjust-

ment" if there is substance to the allegations in that complaint; and his decision, when made, merely ripens the controversy for judicial action if needed. On this point plaintiffs are not aided by *Lane* v. *Wilson*, 307 U.S. 268 (1939). The pertinent issue there was whether plaintiff had to resort to the State Courts to "vindicate his grievance" of denial of franchise.

The final contentions made by plaintiffs are that the Illinois administrative remedy is not available to individuals since it must be initiated by a complaint signed by at least fifty persons; and that the remedy is inadequate because the Superintendent of Public Instruction has no power himself to correct the discrimination if he finds it to exist. The requirement of fifty signatures is not in itself an unreasonable one, since the function of the requirement is similar to that of a class suit, that is, one of convenience and orderly procedure for presentation in a common cause many individual complaints instead of many individual particular causes. Also, defendants point out with force that the allegations of the complaint indicate that the School Code remedy would not practically be unavailable to plaintiffs. Furthermore, the School Code gives the Superintendent the power to initiate a hearing whenever he has reason to believe discrimination may exist in any school district. There is no claim that any individual in the class represented by plaintiffs requested the Superintendent to initiate a hearing. And, in practice, if an individual is denied the remedy he may then turn to the Federal Courts.

We must assume the administrative officials will do their duties under the School Code, *Carson* v. *Warlick*,

(Opinion of the United States Court of Appeals)

4 Cir., 238 F.2d 724, 728, cert. denied, 353 U.S. 910 (1956), and it is generally accepted in the cases[*] that Federal Courts should not interfere with a State's operation and administration of its schools, nor with the performance of administrative duties, in the absence of necessity, until administrative remedies have been exhausted.

For the reasons given, we hold that the District Court did not err in "dismissing" plaintiffs' suit on the ground that plaintiffs had not resorted to their administrative remedy under the Illinois School Code.

The judgment of the District Court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

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[*] *E.g., Parham* v. *Dove*, 8 Cir., 271 F.2d 132 (1959); *Carson* v. *Warlick*, 4 Cir., 238 F.2d 724, cert. denied, 353 U.S. 910 (1956).

APPENDIX B.

Opinion Of The United States District Court Northern District Of Illinois Eastern Division

Juergens, Judge

This class action was instituted by the minor plaintiffs, who appear by their parents and next friends. Plaintiffs are citizens of the State of Illinois and reside within the Eastern District of Illinois.

Jurisdiction is founded on Title 28, U.S.C.A., Section 1343(3), and authorized by Title 42, U.S.C.A., Section 1983.

The amended complaint alleges that the minor plaintiffs are all Negro children, are eligible to attend public elementary schools in Community Unit School District No. 187, which schools are under the management and control of defendants; that the members of the class in behalf of which plaintiffs sue are so numerous as to make it impracticable to bring them all individually before the Court, but there are common questions of law and fact involved, common grievances arising out of common wrongs, and common relief is sought for each plaintiff and each member of the class, and the plaintiffs fairly and adequately represent the interests of the class; that the defendants are presently maintaining and operating public schools in the area or areas of the respective jurisdictions in purported pursuance of the laws of the State of Illinois; that the defendants have adopted and pursued and are presently pursuing a policy, custom and practice in assigning chil-

dren to the elementary public schools in accordance with "neighborhood school policy" or "attendance area policy," where children are compelled to attend schools in the attendance areas in which they reside and are not permitted to attend schools in any other place except in certain special circumstances not applicable to these plaintiffs; that the Chenot School was put into operation in 1957 and was planned and built and its attendance area boundaries were so drawn as to make it an exclusively Negro school in its student enrollment; that as a direct, proximate and foreseeable result of the defendants' adoption and strict pursuance of the alleged "neighborhood school policy" or "attendance area policy", defendants have created and do maintain and operate racially segregated elementary schools and the minor plaintiffs are compelled to attend a racially segregated school by actions of the defendants herein; that prior to 1957 when the Chenot School was put into operation, Negro elementary school students residing in what is now the Chenot attendance area attended the Centreville School, where said Negro children were compelled to attend classes in the afternoon exclusively, while white children attended classes in the morning exclusively with the exception of certain slow white fifth and sixth grade students who attended classes all day; that when the Chenot School was put into operation, all or practically all of the children of elementary school age who resided in the Chenot attendance area were Negroes; that the manner in which the Chenot attendance areas were drawn resulted in making Chenot School an all Negro school in the student enrollment; that because of the crowded condition of the Centreville School, the Board of Education transferred all fifth

and sixth grade classes at Centreville School to Chenot School; that these classes consisted of approximately 97% white and 3% Negro students; that these classes were kept and maintained intact at the Chenot School despite the fact that the children so involved were carried on the rolls as Chenot students and their teachers as members of the Chenot faculty; that as a result of the above and foregoing a situation of racial segregation and separate educational facilities was created and has been maintained by the defendants; that the conditions created continue to exist; that the defendants have failed and refused to desegregate the schools under their jurisdiction but act in such a manner to perpetuate the system of segregated schools and facilities; that by reason of the "neighborhood school policy" or "attendance area policy" as adopted and enforced by the defendants and as a result of the schemes, plans and contrivances of the defendants in drawing the boundary lines in the schools under their jurisdiction, the defendants have created and are maintaining and operating racially segregated public elementary schools in District No. 187 and the minor plaintiffs are assigned to and compelled to attend such racially segregated school by the acts of the defendants and consequently are denied the equal protection of law and equal opportunity for education to which they are entitled by reason of law; that requiring plaintiffs and their class to attend the segregated schools and educational facilities causes them to suffer and sustain irreparable injury and they will be irreparably harmed unless the defendants are enjoined by this Court; that any other relief to which plaintiffs could be remitted would be attended by such uncertainties and delays as to deny plaintiffs

the substantial relief to which they are entitled; that plaintiffs have not exhausted any administrative remedies provided by the laws of the State of Illinois for the reason that the remedy there provided is inadequate to provide the relief sought by the plaintiffs. The plaintiffs pray that this Court enter an order adjudging and declaring the "neighborhood school policy" or "attendance area policy" as employed by the defendants to be illegal and unconstitutional and in violation of plaintiffs' rights and for other and further relief.

The Board of Education and Robert F. Catlett filed their motions to dismiss the complaint and motions for preliminary injunction. Thereafter, plaintiffs asked and were granted permission to file their amended complaint, the pertinent portions of which are above set out. They do not ask for a preliminary injunction in their amended complaint.

The Board of Education's and Robert F. Catlett's motions to dismiss the amended complaint are before the Court.

The question at this point is limited; it is one of procedure and not of substance; it is one of mere practice and not of merit.

At this juncture the question for the Court to determine is not whether the plaintiffs have been denied the equal protection of the laws guaranteed to them by the Fourteenth Amendment but whether they have in the first instance proceeded in the proper manner for securing the remedies which have been provided (by the State of Illinois with an administrative review proceeding) in the

event that their constitutional rights have been denied to them.

In support of their motions to dismiss the amended complaint, the Board of Education and Robert F. Catlett assert, among other things, that the plaintiffs have failed to exhaust the procedures provided under the laws of the State of Illinois, which provide remedies to persons aggrieved for the reasons complained of in the complaint.

Where a state law provides adequate administrative procedure for the protection of rights, the federal courts manifestly should not interfere with the operation of the schools until such administrative procedure has been exhausted and the intervention of the federal courts is shown to be necessary. *Parham* v. *Dove*, 8 Cir. 1959, 271 F. 2d 132. *Covington* v. *Edwards*, 4 Cir. 1959, 264 F. 2d 780.

Section 22-19, Chapter 122, Illinois Revised Statutes, 1961, provides as follows:

> "Sec. 22-19. Upon the filing of a complaint with the Superintendent of Public Instruction, executed in duplicate and subscribed with the names and addresses of at least 50 residents of a school district or 10%, whichever is lesser, alleging that any pupil has been excluded from or segregated in any school on account of his color, race, nationality, religion or religious affiliation, or that any employee of or applicant for employment or assignment with any such school district has been questioned concerning his color, race, nationality, religion or religious affiliation or subjected to discrimination by reason thereof, by or on behalf of the school board of such district, the Superintendent of Public Instruction shall promptly mail a copy of such complaint to the secretary or clerk of such school board.

(Opinion of the United States District Court)

"The Superintendent of Public Instruction shall fix a date, not less than 20 nor more than 30 days from the date of the filing of such complaint, for a hearing upon the allegations therein. He may also fix a date for a hearing whenever he has reason to believe that such discrimination may exist in any school district. Reasonable notice of the time and place of such hearing shall be mailed to the secretary or clerk of the school board and to the first subscriber to such complaint.

"The Superintendent of Public Instruction may designate an assistant to conduct such hearing and receive testimony concerning the situation complained of. The complainants may be represented at such hearing by one of their number or by counsel. Each party shall have the privilege of cross examining witnesses. The Superintendent of Public Instruction or the hearing officer appointed by him shall have the power to subpoena witnesses, compel their attendance, and require the production of evidence relating to any relevant matter under this Act. Any Circuit or Superior Court of this State, or any judge thereof, either in term time or vacation, upon the application of the Superintendent of Public Instruction or the hearing officer appointed by him, may, in its or his discretion, compel the attendance of witnesses, the production of books, papers, records or memoranda and the giving of testimony before the Superintendent of Public Instruction or the hearing officer appointed by him conducting an investigation or holding a hearing authorized by this Act, by an attachment for contempt, or otherwise, in the same manner as production of evidence may be compelled before said court. The Superintendent of Public Instruction or the hearing officer appointed by him may cause the depositions of witnesses within the State to be taken in the manner prescribed by law for like depositions in civil actions in courts of this State, and to that end compel the

attendance of witnesses and the production of books, papers, records or memoranda. All testimony shall be taken under oath administered by the hearing officer, but the formal rules pertaining to evidence in judicial proceedings shall not apply. The Superintendent of Public Instruction shall provide a competent reporter to take notes of all testimony. Either party desiring a transcript of the hearing shall pay for the cost of such transcript. The hearing officer shall report a summary of the testimony to the Superintendent of Public Instruction who shall determine whether the allegations of the complaint are substantially correct. The Superintendent of Public Instruction shall notify both parties of his decision. If he so determines, he shall request the Attorney General to apply to the appropriate circuit court for such injunctive or other relief as may be necessary to rectify the practice complained of.

"The provisions of the 'Administrative Review Act,' approved May 8, 1945, and all amendments and modifications thereof and the rules adopted pursuant thereto shall apply to and govern all proceedings for the judicial review of any final decision rendered by the Superintendent of Public Instruction pursuant to this Section."

Plaintiffs assert that the remedy provided by the statute, hereinabove set out, does not provide an adequate procedure whereby plaintiffs may present their case for consideration before an administrative agency in that a judicial remedy is provided by the statute rather than an administrative remedy; that there is no individual right since it is required that there be 50 signatures on the complaint and further that notice is sent only to the first person on the petition; that there is no action in behalf of an individual but rather the action is in behalf of

the State of Illinois and thus there is no right of counsel or redress of wrong by an individual.

The plaintiffs' contention that an administrative remedy is not provided by the statute above is without merit. By the statute the Superintendent of Public Instruction or an assistant designated by him is charged with the responsibility of conducting a hearing to determine the validity of the complaint authorized to be filed under the statute. The complainants are specifically granted the right of representation by counsel and are further granted the privilege of cross examination.

The action instituted here is a class action, wherein the plaintiffs seek to have this Court enter a remedial order in favor of the entire class and in the words of the complaint the entire school area here involved is comprised of persons who it is alleged by the complaint are aggrieved and for whom relief is sought. Thus, it would appear that had the plaintiffs sought to obtain the signatures of a sufficient number of persons to proceed under the statute, there in all likelihood would have been little difficulty in obtaining the number of signatures required.

Plaintiffs, however, have not endeavored by any manner or means to attempt a proceeding under the statute but rather have elected to ignore the statute and thereby deprive the State of Illinois the opportunity to rectify its own wrong if it is found that one does exist.

It may well be that an attempt by plaintiffs to meet the requirements of the statute may be unsuccessful in that they may not be able to obtain a sufficient number of signatures on the complaint, or it may be impossible for plaintiffs to cause the Superintendent of Public Instruc-

tion to intercede on his own volition; yet, the Court is of the opinion that until the plaintiffs have attempted to avail themselves of the provisions that the administrative review provides, they have failed to comply in the remotest manner with the administrative remedy provisions, and until at least an honest attempt is made to pursue that remedy, this Court should not interfere with the state authorities and deprive them of the opportunity to put their own house in order. Since the plaintiffs have failed to pursue or even attempt to pursue the administrative remedy provided, this Court should not entertain this cause of action.

The mere assertion by plaintiffs that the administrative review provided for under the laws of the State of Illinois is inadequate, without first having attempted to utilize that remedy, does not show this Court that the administrative review is in fact ineffective to produce the result attempted by the statute and desired herein by these plaintiffs.

The motions to dismiss the amended complaint will be allowed.

/s/ William G. Juergens
United States District Judge

Dated: November 22, 1961

APPENDIX C.

Additional Statute Involved

Section 22-19, Chapter 122, Illinois Revised Statutes, 1961:

> Sec. 22-19. Upon the filing of a complaint with the Superintendent of Public Instruction, executed in duplicate and subscribed with the names and addresses of at least 50 residents of a school district or 10%, whichever is lesser, alleging that any pupil has been excluded from or segregated in any school on account of his color, race, nationality, religion or religious affiliation, or that any employee of or applicant for employment or assignment with any such school district has been questioned concerning his color, race, nationality, religion or religious affiliation or subjected to discrimination by reason thereof, by or on behalf of the school board of such district, the Superintendent of Public Instruction shall promptly mail a copy of such complaint to the secretary or clerk of such school board.
>
> The Superintendent of Public Instruction shall fix a date, not less than 20 nor more than 30 days from the date of the filing of such complaint, for a hearing upon the allegations therein. He may also fix a date for a hearing whenever he has reason to believe that such discrimination may exist in any school district. Reasonable notice of the time and place of such hearing shall be mailed to the secretary or clerk of the school board and to the first subscriber to such complaint.
>
> The Superintendent of Public Instruction may designate an assistant to conduct such hearing and receive testimony concerning the situation complained of.

(Additional Statute Involved)

The complainants may be represented at such hearing by one of their number or by counsel. Each party shall have the privilege of cross examining witnesses. The Superintendent of Public Instruction or the hearing officer appointed by him shall have the power to subpoena witnesses, compel their attendance, and require the production of evidence relating to any relevant matter under this Act. Any Circuit or Superior Court of this State, or any judge thereof, either in term time or vacation, upon the application of the Superintendent of Public Instruction or the hearing officer appointed by him, may, in its or his discretion, compel the attendance of witnesses, the production of books, papers, records or memoranda and the giving of testimony before the Superintendent of Public Instruction or the hearing officer appointed by him conducting an investigation or holding a hearing authorized by this Act, by an attachment for contempt, or otherwise, in the same manner as production of evidence may be compelled before said court. The Superintendent of Public Instruction or the hearing officer appointed by him may cause the depositions of witnesses within the State to be taken in the manner prescribed by law for like depositions in civil actions in courts of this State, and to that end compel the attendance of witnesses and the production of books, papers, records or memoranda. All testimony shall be taken under oath administered by the hearing officer, but the formal rules pertaining to evidence in judicial proceedings shall not apply. The Superintendent of Public Instruction shall provide a competent reporter to take notes of all testimony. Either party desiring a transcript of the hearing shall pay for the cost of such transcript. The hearing officer shall report a summary of the testimony to the Superintendent of Public Instruction who shall determine whether the allegations of the complaint are substantially correct. The Superintendent of Public

(Additional Statute Involved)

Instruction shall notify both parties of his decision. If he so determines, he shall request the Attorney General to apply to the appropriate circuit court for such injunctive or other relief as may be necessary to rectify the practice complained of.

The provisions of the "Administrative Review Act," approved May 8, 1945, and all amendments and modifications thereof and the rules adopted pursuant thereto shall apply to and govern all proceedings for the judicial review of any final decision rendered by the Superintendent of Public Instruction pursuant to this Section.

No. 480

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

LOUIS McNEESE, JR., a minor, by Mabel McNeese, his mother and next friend, et al.,

Petitioners,

vs.

BOARD OF EDUCATION FOR COMMUNITY UNIT SCHOOL DISTRICT 187, Cahokia, Illinois, et al.,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE.

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The Scheffer Press, Inc.—ANdover 3-6850

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Respondents.

MOTION OF ILLINOIS DIVISION, AMERICAN CIVIL LIBERTIES UNION, FOR LEAVE TO FILE ATTACHED BRIEF AS AMICUS CURIAE.

The Illinois Division of the American Civil Liberties Union, a New York corporation, respectfully moves for leave to file the attached brief as *amicus curiae*, in support of petitioners in this cause, pursuant to Rule 42(3) of the rules of this Court. Petitioners have consented to the filing of this brief in a letter on file with the Clerk of this Court. Counsel for respondents replied to the request of amicus for consent by saying that no decision could be made until after the Board of Education meeting scheduled for February 11, 1963. All correspondence is on file with the clerk of this Court.

In support of this motion, amicus states:

1. For more than forty years, the American Civil Liberties Union has dedicated itself to the preservation and advancement of those liberties considered basic to a free society. The ACLU believes that it is of the utmost importance to ensure prompt access to a federal forum for litigants who claim that federal constitutional rights have been denied by state officials.

2. The central question presented by this case is whether or not a plaintiff challenging racial segregation in a school district can be denied access to a federal district court under 28 U.S.C. 1343 until he has exhausted whatever remedy is provided by state administrative procedures. A similar question has arisen in a pending case in which movant is participating, *Owens* v. *Board of Education*, No. 1886D (D.C. E.D. Ill.), and disposition of this issue in the instant litigation will directly affect movant's position in that case.

3. The ACLU filed a brief as amicus in support of the appellants in *Brown* v. *Board of Education*, 347 U.S. at 485. We believe that the reversal of the decision below in this cause is necessary in order to implement the principles set forth by this Court in the *Brown* case.

4. Petitioners' brief deals with the nature and adequacy of the specific administrative remedies provided by Illinois for the existence of segregation in state public schools. The amicus brief submitted herein seeks to treat the larger question of the extent of the jurisdiction of federal district courts under 28 U.S.C. 1343 and the federal Civil Rights Act, and discusses the historical background and policies behind those acts. The presentation in movant's brief does not repeat material contained in petitioners' brief.

Respectfully submitted,
Illinois Division,
American Civil Liberties Union

.....

By Alex Elson,
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IN THE

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Respondents.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE

INTEREST OF AMICUS

The American Civil Liberties Union is dedicated to the preservation and promotion of the basic civil liberties of a free society. Amicus believes that administrative procedures provided by a state in the area of school desegregation cannot control construction and application of the Federal Civil Rights Act which provides protection in the federal courts for federally secured rights.

ARGUMENT.

I. A REQUIREMENT OF EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES NULLIFIES THE CONSTITUTIONAL RIGHT TO AN EDUCATION ON A NON-DISCRIMINATORY BASIS.

Regard for state sovereignty within the federal system cannot continue to control the functioning of the federal judiciary as the states devise rules and regulations and establish a hierarchy of administrative bodies to protract the procedure by which those, such as petitioners, can enjoin segregation in the public schools.[1] An analysis of the litigation and of statistics in the area of school segregation should help the Court to see what is already known by many. A court, as Chief Justice Taft stated, would be blind not to see what "all others can see and understand." *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, 37 (1922). "There is no reason why (Courts) should pretend to be more ignorant or unobserving than the rest of mankind." *Affiliated Enterprises* v. *Waller*, 1 Terry 28, 1 Del. 28, 5 A.2d 257, 261.

In problems of racial discrimination in schools, the statistics are revealing and significant, and the courts may

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[1] See, for example, Ala. Acts 1955, Vol. 1, No. 201, p. 492; Ark. Acts 1959, Vol. 2, No. 461, p. 1827; Fla. Laws 2d Ex. Sess. 1956, ch. 31380, p. 30; Ga. Laws 1961, H. Res. No. 225; La. Acts 1958, Act No. 259, p. 856; Miss. Acts 1960, S. Bill Nos. 2010, 1900; N.C. Laws Ex. Sess. 1956, ch. 7, p. 14; S.C. Acts 1955, No. 55, p. 83; Tenn. Acts 1957, ch. 13, p. 40; Tex. Acts 1957, ch. 287, p. 683; Va. Acts Ex. Sess. 1956, ch. 70, p. 74, as amended by Va. Acts 1958, ch. 500, p. 638, as amended by Va. Acts Ex. Sess. 1959, ch. 71, p. 165.

have reason to find that disparities of such magnitude almost preclude any explanation except a policy and pattern of racial discrimination by state officials.[2]

What is perhaps most disturbing is that to require an exhaustion of state administrative remedies by those seeking admission to non-segregated schools is to forget that the denial of this right by state agencies, by state officials, and by state procedure led to the *Brown* v. *Board of Education* decision 347 U.S. 483 (1954), and to subsequent litigation. As was stated in a significant case, in which complainants charged discrimination in the administration of voter registration and in other aspects of voter qualification:

> "The problem has its genesis in racial discrimination. . . . The Federal Court may—and perhaps must—take action on a showing of discrimination even though to do so effectually bypasses or dispenses with review by a State administrative or judicial tribunal. The occasional necessity of some such interruption of normal, ordinary processes was therefore, contemplated and authorized by Congress." *State of Alabama* v. *United States*, 304 F. 2d 583, 585, 590 (5th Cir., 1962).

The federal judiciary must not allow the detrimental effects of segregated education to continue by its failure to provide an effective means of combating those defensive and offensive efforts by the states to increase and

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[2] Appendix A contains statistics on school segregation-desegregation. Courts have studied and used similar statistical summaries to find patterns of racial discrimination in other areas. See, for example, the statistics on the registration of voters in **State of Alabama v. United States**, 304 F.2d 583, 586 (5th Cir. 1962); the statistics on the composition of Petit and Grand Juries, **United States v. Harpole**, 263 F.2d 71 (5th Cir. 1959) and other cases collected in footnote 13 at page 77.

prolong those deleterious effects.[3] In the *State of Alabama* case the Court of Appeals for the Fifth Circuit found "full and elastic resources" for the shaping of a remedy to vindicate the fundamental constitutional rights of those Negro voters who had been discriminatorily denied registration because of their race and color. As the court said:

> "Here the matter at stake is the fulfillment of a policy wrought out after extensive consideration of what Congress thought to be contemporary evils by States and agencies of States in the spurious, sometimes sophisticated, sometimes crude, practices by which Negroes were effectively denied the right to vote because of color and race alone. It was this evil which brought about the statute. It is inconceivable that in its enactment Congress meant by this broad language to grant less than effective judicial tools to combat it." 304 F. 2d at p. 591.

It is equally inconceivable that this Court intends to condone either "spurious," "sophisticated," or "crude" efforts to dilute the impact of *Brown* v. *Board of Education*. Certain states have in the past devised a number of schemes intended to circumvent other constitutional guarantees. However, even when state laws, rather than state administrative procedures, have been used to resist or nullify decisions of this Court regarding constitutional rights, this Court has found no reason to withhold access to the

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[3] See "Education: Survey of Developments 1957-61," Race Relations Law Reporter, vol. 6, no. 3, which discusses state defensive methods (pupil placement, school closings, private school legislation and grants, and repeal of compulsory school attendance) and affirmative actions of resistance (state sovereignty commissions and various registration and filing requirements applied to the N.A.A.C.P.). See also Maslow and Cohen, School Segregation, Northern Style, Public Affairs Pamphlet, #316 (1961).

federal courts because of any vague fear of imbalancing the federal system. For example, two attempts by Oklahoma to disregard the prohibitions of the Fifteenth Amendment were struck down. *Guinn* v. *United States*, 238 U.S. 347 (1915) and *Lane* v. *Wilson*, 307 U.S. 268 (1939). In the *Lane* case, the Court invalidated the state statute, saying that the Fifteenth Amendment barred "sophisticated as well as simple-minded" "contrivances by a state to thwart equality in the enjoyment of the right to vote." (307 U.S. at p. 275). This Court also affirmed the judgment of the three-judge court that the Boswell Amendment to the Alabama Constitution, which required prospective voters to explain a section of the Alabama Constitution to a registrar, was another device in complete disregard of the Fifteenth Amendment. *Schnell* v. *Davis*, 336 U.S. 933, affirming 81 F. Supp. 872 (1949). Similarly, the "White Primary" cases originated in federal courts and involved state laws which nullified decisions of this Court; these cases like the voting cases were decided in the federal courts without a requirement that the states must first construe their statutes aimed at invidious discrimination between white citizens and black (*Nixon* v. *Herndon*, 273 U.S. 536 (1927); *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Terry* v. *Adams*, 345 U.S. 461 (1953).

Neither a "scrupulous regard for the rightful independence of state governments . . ." *Matthews* v. *Rodgers*, 284 U.S. 521, 525 (1932), nor the "contribution . . . in furthering the harmonious relation between state and federal authority . . ." *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 501 (1941) requires deference to that local procedure which evades federal law by defiance and dilution of the principle that racial discrimination in public

education is unconstitutional and that "all provisions of Federal, State, or local law requiring or permitting such discrimination must yield to this principle." *Brown* v. *Board of Education*, 349 U.S. 294, 298 (1955).

The right to an education on a non-discriminatory basis is a precious and fundamental right of each individual child in this country. It is indeed cruel to say that a pattern of segregation in the schools can be proved only by the application to a board or to a hearing officer by first one child and then another child[4] or by one group of fifty children and their parents and then by another group of fifty children and their parents[5] and the denial of each such petition with the subsequent maze of rehearings, objections, and appeals.

When federal courts refuse to hear a case until each aggrieved child and his parents exhaust all administrative appeals, there is an invitation to continue the dual school system by the use of stringent and cumbersome procedural requirements.[6] The case of *Jeffers* v. *Whitley*, 197 F. Supp. 84 (M.D. N.C. 1961) demonstrates the ease with which the rule of exhaustion of administrative remedies can serve as a virtual judicial repeal of the law of desegregation. In the *Jeffers* case, plaintiffs brought a class action seeking an order requiring the school board

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[4] Carson v. Warlick, 238 F. 2d 724 (4th Cir., 1956); Covington v. Edwards, 264 F. 2d 780 (4th Cir., 1959); Holt v. Board of Education, 265 F. 2d 95 (4th Cir., 1959).

[5] Illinois Revised Statutes, 1961, Chapter 122, Section 22-19; McNeese v. Board of Education, 305 F. 2d 783 (7th Cir., 1962).

[6] For example, over fifty acts were passed during the 1960 extraordinary sessions of the Louisiana legislature, in an effort to continue the dual public school system in that state. See Race Relations Law Reporter, Vol. 5, No. 4 (Winter, 1960), for the complete texts of these resolutions and acts.

to prepare a desegregation plan for the schools. The court found that, of the eight minor plaintiffs who had requested transfers and who had attempted to exhaust their administrative remedies, three had failed to do so because they appeared at the school board hearing by their attorneys, rather than in person or by their parents, and that the other five, by failing to request transfers to *specific* schools, had not exhausted their remedies. Crudely, and yet effectively, did this administrative procedure emasculate the constitutional rights of these eight plaintiffs.

Similarly the more sophisticated, and perhaps better-intentioned, administrative remedy provided by the Illinois statute (Illinois Revised Statutes 1961, Chapter 122, Section 22-19) merely doubles the cost of litigation, requiring the federal court to sit idly by while records, books, and papers are produced; witnesses are called to testify; and arguments are made before the hearing officer appointed by the Superintendent of Public Instruction. The state administrative remedy is indeed deceptive in Illinois. After days or months of sessions, the superintendent may or may not take action. Is there any question that the required utilization of such state administrative machinery "dilutes the stature of the Federal District Courts, making them secondary tribunals in the administration of justice under the Federal Constitution"? *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, Douglas, *J.* dissenting at p. 180.

Those such as the petitioners in the instant case, who come before a federal court in a class action on behalf of themselves and all pupils in the school district similarly situated, allege an intransigent policy of segregation —either in the application of a pupil placement plan or in the rigid retention of a neighborhood school policy or in

the formation of gerrymandered attendance districts. They ask for desegregation of that school system. They do not ask merely for admission to a specified school. This distinction was understood and emphasized by the court in its decision in *Flax* v. *Potts*, 204 F. Supp. 458, 465 (N.D. Texas, 1962):

> "A judgment declaring unconstitutional a policy of racial segregation in a school system and providing for its termination with deliberate speed is the proper type of relief to be granted in these cases, if the pleadings are broad enough to justify it.'"

The rule of exhaustion of administrative remedies in school segregation cases forebodes an even more extensive use of evasive state legislation and of onerous, illusory administrative remedies, to frustrate the constitutional rights of plaintiffs in school segregation cases.[8] The pupil placement law[9] has been "the principal obstacle to

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[7] See also: **Carter v. School Board of Arlington County**, 182 F. 2d 531, 536 (4th Cir., 1950); **Gibson v. Board of Public Instruction of Dade County**, 246 F. 2d 913; (5 Cir., 1957); **School Board of City of Charlottesville v. Allen**, 240 F. 2d 59 (4 Cir., 1956); and **School Board of City of Newport News v. Atkins**, 246 F. 2d 325 (4 Cir., 1957); **Mannings v. Board of Education of Hillsborough County, Florida**, 277 F. 2d 370 (5th Cir., 1960).

[8] The history of state efforts to avoid integration in the schools does indeed show an evolution from direct opposition to the present more sophisticated forms of subversion of the constitutional principles set forth in **Brown v. Board of Education.** See "State Efforts to Circumvent Desegregation: Private Schools, Pupil Placement, and Geographic Segregation," 54 Nw. U. L. Rev. 354 (1959).

[9] With the exception of a very few cases, those petitions dismissed in the federal courts for plaintiffs' failure to exhaust state administrative remedies have all involved pupil placement laws.

desegregation in the South.'"[10] The success of these pupil placement laws as defiant assaults on the constitutional right of all pupils to be admitted to public schools, with all deliberate speed on a non-discriminatory basis, is phenomenal: The two circuits which have held that the pupil assignment laws are on their face a valid means of effecting desegregation and that this state administrative procedure must first be followed, include Virginia, South Carolina, Arkansas and North Carolina. Less than one-tenth of one per cent of the nearly one million Negro children in these states attended bi-racial schools in 1962.[11]

The judicial discontent with state administrative procedures as masks for a segregation policy has been unequivocally expressed by several of the lower courts:

> "This law, as shown on its face, is not a plan for desegregation nor is desegregation a part of its subject matter or purpose. As the court understands it, its real purpose is to codify the law as it already existed. . . . The pupil placement law at best provides a most cumbersome and time-consuming procedure to accomplish transfer of students. . . ." *Sloan* v. *Tenth District of Wilson County, Tennessee,* Civ. No. 3107 (M.D. Tenn., Nov. 22, 1961), 6 Race Rel. L. Rep. 999.
>
> "Under these circumstances it would be almost a cruel joke to say that administrative remedies must be exhausted when it is known that such exhaustion of remedies will not terminate the pattern of racial assignment but will lead to a remedy only in a few given

[10] Report of the United States Civil Rights Commission, Civil Rights U.S.A., Public Schools, Southern States 1962, p. 4. This indictment of the pupil assignment laws is echoed on page 6 of the same report.

[11] **Ibid.,** at p. 6.

cases based on geography—a consideration which has been disregarded in the assignment of white pupils." *Jackson* v. *School Board of City of Lynchburg, Va.*, 201 F. Supp. 620 (W.D. Va., 1962).

"This court . . . condemns the Pupil Placement Act when, with a fanfare of trumpets it is hailed as the instrument for carrying out a desegregation plan while all the time the entire public knows that in fact it is being used to maintain segregation by allowing a little token integration." *Bush* v. *Orleans Parish School Board*, Civ. No. 19270 (5th Cir., Aug. 6, 1962), 7 Race Rel. L. Rep. 693.[12]

Indeed, it seems unreasonable that each state might create its own labyrinth of hearings, appeals, statutes of limitation, and re-hearings so that the protection of this federally secured right by judicial scrutiny of school board actions and policies would depend on the vagaries of state administrative procedures. Giving deference to state administrative procedure in the school segregation cases is indeed unwarranted when the evidence shows that such remedies, designedly or unwittingly, entrench and prolong the pattern of segregation.

II. TO REQUIRE THE EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES NEGATES BOTH THE LANGUAGE AND THE POLICY OF THE CIVIL RIGHTS ACT.

The civil rights statutes were enacted by Congress to enforce the provisions of the Fourteenth and Fifteenth amendments:

"The purpose of this bill is, if possible and if necessary, to render the American citizen more safe in

[12] See also Green v. School Board of the City of Roanoke, 304 F. 2d 118, 123 (4th Cir., 1962) which found intolerable the discrimination "inherent in the initial assignment system" under the Virginia Pupil Placement Act.

> the enjoyment of . . . rights, privileges, and immunities. . . . I conclude, then, Mr. Speaker, by saying that in my opinion Congress has power to legislate for the protection of every American citizen in the full, free, and undisturbed enjoyment of every right, privilege, or immunity secured to him by the Constitution; and that this may be done—*First*. By giving him a civil remedy in the United States courts for any damage sustained in that regard." *Cong. Globe*, 42nd Cong. 1st Sess., pp. 475, 477 (April 5, 1871), remarks by Rep. Dawes.

Congress was aware of the possible futility of getting relief on the local or state level for the vindication of those rights denied by officials of the state."

This Court has examined the 1871 debates on the Civil Rights Act in their entirety and has concluded:

> "The third aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. The opposition to the measure complained that 'It overrides the reserved powers of the States,' just as they argued that the second section of the bill 'absorb (ed) the entire jurisdiction of the States over their local and domestic affairs'. . . .
>
> "The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe v. Pape*, 365 U.S. 167, 174, 180 (1961).

Thus, Congress vested original jurisdiction in the federal courts in order to enforce the substantive rights conferred

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[3] See Appendix B, "Memorandum on the Legislative History of § 1979."

by the Civil Rights Act.[14] To require petitioners in these school segregation cases to exhaust state administrative remedies is to ignore this mandate of the Civil Rights Act by determining that the agency or board *must initially* decide the issues. Thus, the original jurisdiction of the case is allocated to the state agency under the theory of "primary jurisdiction." Proponents of this theory would apply the concepts underlying the Administrative Procedure Act, 5 U.S.C.A. § 1001 *et seq.* (1946), and similar state administrative review acts, which are concerned with the judicial review of final agency action.[15] However, when petitioners seek access to the federal courts under the substantive provisions of 42 U.S.C.A. § 1983 and under the procedural provisions of 28 U.S.C.A. § 1343 (3), they cannot be barred by a doctrine of "priority of jurisdiction" in an agency. The federal judiciary, not a state superintendent of education and not a state sovereignty commission, is vested with original jurisdiction: "The district courts *shall* have *original* jurisdiction. . . . " 28 U.S.C.A. § 1343 (Emphasis added) That original jurisdiction cannot be usurped by giving "pre-original" jurisdiction to a state agency.

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[14] The Civil Rights Act of 1871 provided for exclusive federal jurisdiction. 17 Stat. 13. The codification of 1874 separated the substantive and jurisdictional parts of the Act, and the jurisdictional paragraphs were re-phrased. See R. S. §§ 563(12), 629(16). However, there is no evidence that Congress intended to change the meaning of the law by its 1874 revisions. The jurisdictional paragraph, 28 U.S.C. § 1343 now provides: "The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State law, . . . of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights . . . of all persons within the jurisdiction of the United States." See Brief for Petitioners, p. 14, **Monroe v. Pape**, 365 U.S. 167 (1961).

[15] 5 U.S.C.A. § 1009.

III. THE RULE OF EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES CANNOT BE USED TO NULLIFY THE GRANT OF ORIGINAL JURISDICTION IN THE FEDERAL COURTS FOR THOSE ALLEGING RACIAL SEGREGATION IN PUBLIC SCHOOLS.

Neither the federal courts nor the state courts follow an absolute rule that a party must always exhaust his administrative remedies before coming into court.[16] The doctrine of exhaustion of administrative remedies is unworkable and unwise when it is reduced to a neat word formula or an absolute requirement.[17] It is a doctrine based on judicial self-limitation, not a rule enervating jurisdiction. The law embodied in the holdings since *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), is clearly that sometimes exhaustion is required and sometimes not.[18]

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[16] Davis, "Exhaustion of Administrative Remedies," Administrative Law Treatise, vol. 3, §§ 20.01-20.10.

[17] See the frank statement by the Court of Claims. "There is no absolute requirement that a party exhaust his administrative remedies before coming into court. The court may entertain his suit before he has done so, if in its discretion it thinks the circumstances make it appropriate to do so." **Adler v. United States**, 146 F. Supp. 956, 957-958 (Ct. Cl., 1956). See also Davis, op. cit., § 20.03.

[18] Exhaustion of administrative remedies not required in **Allen v. Grand Central Aircraft Co.**, 347 U.S. 535 (1954); **Bethlehem Steel Co. v. New York State Labor Relations Board**, 330 U.S. 767 (1947); **Order of Railway Conductors of America v. Swan**, 329 U.S. 520 (1947); **Illinois Commerce Commission v. Thomson**, 318 U.S. 675 (1943).

Exhaustion of administrative remedies required in **Franklin v. Jonco Aircraft Corp.**, 346 U.S. 868 (1953); **Aircraft & Diesel Equipment Corp. v. Hirsch**, 331 U.S. 752 (1947); **Macauley v. Waterman S. S. Corp.**, 327 U.S. 540 (1946).

See also Davis, "Administrative Remedies Often Need Not Be Exhausted," 19 F.R.D. 437 (Adv. No. 9, Jan. 1957).

The policy considerations which support the wisdom of the exhaustion doctrine are clearly not applicable in this type of case in which plaintiffs allege a pattern of school segregation.

Considerations of comity are often advanced as one of the primary reasons for applying the exhaustion rule, particularly where action by a state is sought to be controlled through a federal court. For example in *Natural Gas Pipeline Co.* v. *Slattery*, 302 U.S. 300 (1937), this Court affirmed the denial by the district court of the injunction asked for, and stated:

> "The rule that a suitor must exhaust his administrative remedies before seeking the extraordinary relief of a court of equity . . . is of especial force when resort is had to the federal courts to restrain the action of state officers . . ." 302 U.S. at 310.

Another reason given is that in certain areas the administrative agency is better suited by its expertise to determine facts in certain areas. *Aircraft Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 768 (1947); *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540 (1946). A third reason was stated in the *Aircraft Equipment* case:

> "The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision, or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings." (331 U.S. at page 767).

Not one of these various reasons so often given for the required exhaustion of administrative remedies can be sustained when petitioners' fundamental right to an edu-

cation in a non-segregated school is jeopardized because time, finances and complicated state administrative procedures impose grave limitations on any attempt to enforce that right. The doctrine of comity cannot be used to insulate the states so as to allow them to use their power in order to nullify a federally secured right. As this Court said when it enjoined city and county officials of Tuskegee and of Macon County, Alabama, from enforcing a statute which removed from the city all except a few Negro voters and no white voter:

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an 'unconstitutional condition.'" *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347, 348 (1960).

No expertness or special background is required to determine the facts when the charge is one of a policy and pattern of segregation in the public schools. As the court said in *Romero* v. *Weakley*, 226 F. 2d 399, 402 (9th Cir. 1955): "No expert knowledge and experience is required to determine whether the segregation of school children exists."

The third factor often used to justify the rule of exhaustion of state administrative remedies, namely that the agency might sustain the claim of the petitioner, is equally inappropriate in the school segregation cases. One court has accurately observed that when the relief sought is a judgment declaring unconstitutional a policy

of racial segregation, then school boards and appointees of school boards are impotent to give relief:

> "It is manifest that neither the board of county school trustees, nor the state superintendent, nor the state board of education, is vested with any jurisdiction to determine . . . the question whether or not any action by any board of . . . trustees is violative of constitutional rights. Authority to determine such questions is exclusively the function of the judiciary . . ." *Bruce* v. *Stilwell*, 206 F. 2d 554, 556 (5th Cir. 1953)

Denial of these individual rights cannot be avoided by characterizing the rule of exhaustion of state administrative remedies as merely a postponement of federal jurisdiction. A right denied today may never be vindicated if the plaintiffs, who are in each case school children, must go from hearing to hearing or from agency to agency. Such a procedural requirement merely enlarges the hiatus between the wrong and the relief.

CONCLUSION

A study of the two-volume report of the 1962 United States Commission on Civil Rights, which covered public schools in the southern, northern, and western states, indicates how various administrative procedures are used to impede the attempts of students to gain admission to non-segregated schools. The effect and purpose of the pupil placement laws are unequivocally established by the statistics and the litigation.[19] Even an open-transfer system such as that provided in Philadelphia, Pennsylvania, or a special transfer system such as that utilized

[19] See Appendix A of this brief.

in St. Louis, Missouri, can be used to re-segregate after de-segregating.[20]

If the federal judiciary requires exhaustion of state administrative remedies in school segregation cases, whether that remedy be a sophisticated blind alley or a simple-minded road block, then the federal judiciary is not performing its duty as expressed in the Civil Rights Act. The urgency of this duty is underscored by the history of non-compliance with or token implementation of the principles announced by this Court in *Brown* v. *Board of Education* almost nine years ago.

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[20] Civil Rights U.S.A., Public Schools North and West, 1962, Philadelphia, Pennsylvania, pp. 105-173; St. Louis, Missouri, pp. 249-298; pp. 296-297, 191-194. See also Maslow, "De Facto Public School Segregation," 6 Vill. L. Rev. 353-376 (1961).

APPENDIX A.

The following statistical summary of segregation-desegregation activity in Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia, is taken from summaries compiled by the 18 state correspondents of SOUTHERN SCHOOL NEWS and published in November, 1962.

SOUTHERN SCHOOL NEWS is published by the Southern Education Reporting Service, an impartial, fact-finding agency directed by a board of Southern newspaper editors and educators under a grant from the Ford Foundation. Statistics were supplied by agencies of the respective states and are for the 1962-1963 school year, except where indicated.

Definition of Terms

Desegregated—Changed from segregated to biracial or multiracial status, either in practice or principle.

Integration—Absence of all racial distinctions.

Biracial Schools—Ones attended by more than one race.

Districts With Negroes and Whites—A district having both Negro and white students, whether the district is segregated or desegregated.

Negroes w/Whites—Used in tables for number of Negroes attending schools with whites.

Region—Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia.

Status of Segregation-Desegregation

Public Schools

The region has 6,229 school districts, with 3,058 of them having both Negroes and whites. Of these districts having both races, 878 have Negroes attending school with whites and another 94 districts have desegregation policies but no biracial schools. About 85 per cent of the districts desegregated voluntarily, without a court order. The table on page 3a shows that 32.6 per cent of the Negroes are in desegregated districts but of these 1,068,678 Negro students, only 23.9 per cent of them actually attend desegregated schools. The South has 255,367 Negroes in biracial schools, representing 7.8 per cent of the region's 3,279,431 Negroes. The border area, including Delaware, District of Columbia, Kentucky, Maryland, Missouri, Oklahoma and West Virginia, has 475,549 Negro students, or 14.5 per cent of the region's total Negro enrollment, and has 243,150 Negroes in desegregated schools, representing 95.2 per cent of the region's Negroes in desegregated schools. The desegregated Southern states of Arkansas, Florida, Georgia, Louisiana, North Carolina, Tennessee, Texas and Virginia have 1,985,523 Negro students, or 60.5 per cent of the region's total Negro enrollment, and 12,217 are in desegregated schools, representing 4.8 per cent of the region's Negroes in desegregated schools. The three segregated states, Alabama, Mississippi and South Carolina, have 818,359 Negro students, or 25 per cent of the region's total Negro enrollment.

State	School Districts With Negroes			Enrollment		In Desegregated Districts		Negroes In Schools With Whites	
	Total	& Whites	Deseg.	White	Negro	White	Negro	No.	% ‡‡
• Alabama	114	114	0	527,075**	280,212**	0	0	0	—
• Arkansas	417	228	12	320,204***	108,841***	58,993	13,801	250	.230
Delaware	87	87	87	74,417	17,073	61,045	11,684	9,460	55.4
Dist. of Columbia	1	1	1	22,141	110,759	22,141	110,759	87,749	79.2
• Florida	67	67	10	917,557	219,380	531,946*	99,292*	1,168	.532
• Georgia	198	182	1	668,548	327,656	58,629*	51,991*	44	.013
Kentucky	206	167	150	610,000*	43,000*	460,000*	34,000*	22,765**	52.9
• Louisiana	67	67	1	451,778*	297,427*	39,352	59,428	107	.036
Maryland	24	23	23	515,093*	152,667*	510,219	152,667	62,121	40.7
• Mississippi	150	150	0	297,419**	288,089*	0	0	0	—
Missouri	1,633	214*	203*	766,800*	85,200*	NA	75,000*	35,000*	41.1
• North Carolina	173	173	16	802,188	339,841	165,621	78,305	901	.265
Oklahoma	1,180	240	195	513,064*	41,600*	301,430*	34,493*	10,555**	25.4
• South Carolina	108	108	0	361,162	250,058	0	0	0	—
• Tennessee	154	143	25	671,348*	161,000*	289,096*	96,095*	1,817	1.13
• Texas	1,461	919	174	1,951,613*	310,341*	1,100,000*	125,000*	6,700*	2.16
• Virginia	134	132	31	679,230**	221,037**	355,229	100,913	1,230	.556
West Virginia	55	43	43	412,878*	25,250*	412,878	25,250	15,500*	61.4
TOTALS	6,229	3,058	972	10,562,515	3,279,431	4,366,579†	1,068,678	255,367	7.8

• States with pupil placement plans.

‡‡ Proportion of Negroes in schools with whites to total Negro enrollment.

* Estimated ** 1961-62 *** 1960-61 † Missouri not included.

Teachers

Public school teachers remain segregated in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia, including six states that have desegregated schools. The eight other states and the District of Columbia reported some degree of teacher desegregation, although in four states—Missouri, Oklahoma, Texas and West Virginia—a sizeable number of Negro teachers lost their jobs in the change to biracial schools.

Litigation

More than 293 court cases have been filed in state and federal courts on school segregation, desegregation and related issues. Every state in the region has had litigation on the school issue.

Legislation

Legislatures of 16 states have adopted 379 new laws and resolutions to prevent, restrict or control school desegregation. Most of the legislation has been added to the statute books since 1954, although a few laws were enacted in anticipation of the U. S. Supreme Court's 1954 decision. Oklahoma has passed legislation to encourage desegregation. The Missouri and West Virginia legislatures removed racial designations from their school laws, recognizing desegregation as an accomplished fact. In 1959, Maryland ratified the 14th Amendment to the U. S. Constitution, giving approval to the amendment on which the desegregation decisions were based. Alabama, Arkansas, Georgia, Louisiana, North Carolina and Virginia have adopted tuition grant laws. Legislatures in Alabama, Arkansas, Florida, Louisiana, Mississippi, North Carolina,

South Carolina, Tennessee, Texas and Virginia set up pupil placement plans. Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina and Virginia legislators have approved interposition resolutions. Local-option provisions for closing schools are on the law books in Alabama, Florida, Georgia, Mississippi, North Carolina and Texas. Compulsory school attendance laws have been amended or repealed in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee and Virginia. Alabama, Florida, Louisiana and Virginia have laws to encourage or facilitate private schools. Legislation mentioned above has been adopted in other states, but has become invalid by court rulings, later legislation, or failure to receive approval in constitutional referendums.

APPENDIX B.

Memorandum on the Legislative History of § 1979.

We suggest that the legislative history of R. S. § 1979 contains much evidence that the reasons which prompted Congress to confer exclusive federal jurisdiction for actions under R. S. § 1979 are relevant today. The Congress that enacted R. S. § 1979 thought that "prejudices and passions, which make men forget their duties are more likely to be local than national." We suggest that in our own day, the federal judiciary is "more likely to be impartial" in this area of protecting the individual's federally secured right to a non-segregated education.

During the course of the legislative debates on R. S. § 1979, the following statements were made or read into the record:

> "Local prejudices may become so strong and violent that they may overturn that sense of justice which we fondly hope, however, may ever dominate in the bosoms of all our rulers. We well understand the influence of popular sentiment, under elective governments, upon those who depend upon popular will for place and power. Governors, judges, and juries give way to mania which sometimes seizes hold of the popular mind. Prejudices and passions, which make men forget their duties are more likely to be local than national. It is better, therefore, to have a Government less local and more general, and which is responsible to a whole nation and not alone to a small portion. Such a Government is more likely to be impartial, and to remain uninfluenced by prejudice and passions."
>
> Cong. 42nd Cong. 1st Sess., p. 368 (March 31, 1871), remarks by Sheldon of Louisiana.

"The question is sometimes asked, Why do not the courts of law afford redress? Why the necessity of appealing to Congress? We answer that the courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity. What benefit would result from appeal to tribunals whose officers are secretly in sympathy with the very evil against which we are striving?"

Cong. Globe, 42nd Cong. 1st Sess., p. 394 (April 1, 1871) remarks by Rainey of South Carolina.

"Some have here contended that our protection must come from the State in which we chance to reside. The old hateful doctrine of State rights is here urged, and we are told that the Federal Government has nothing to do in behalf of the citizen unless, indeed, the State authorities call for aid. These narrow views are repugnant to me. Our national life is involved in crises such as this. Shall not a power co-extensive with this life be invoked? Do we not instinctively turn to the Government for protection?"

Cong. Globe, 42nd Cong., 1st Sess., App. p. 262 (April 4, 1871), remarks by Dunnell of Minnesota.

"To say in our Constitution . . . that State laws shall not be made or enforced to abridge these rights . . . nor the States deny protection of these rights . . . and then to say that Congress can do no such thing as . . . open the United States courts to enforce any such laws, but must leave all the protection and law-making to the very States which are denying the protection is plainly and grossly absurd."

Cong. Globe, 42nd Cong., 1st Sess., App. p. 68, (March 28, 1871), remarks by Shellabarger of Ohio.

"If the State Legislature pass a law discriminating against any portion of its citizens, or if it fails to enact provisions equally applicable to every class for

the protection of their person and property, it will be admitted that the State does not afford the equal protection. But if the statutes show no discrimination, yet in its judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another, or if secret combinations of men are allowed by the Executive to band together to deprive one class of citizens of their legal rights without a proper effort to discover, detect, and punish the violations of law and order, the State has not afforded to all its citizens the equal protection of the laws."

Cong. Globe, 42nd Cong., 1st Sess., App. p. 315 (April 6, 1871), remarks by Burchard of Illinois.

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No. 480

LOUIS McNEESE, JR., A Minor, By MABEL McNEESE, His Mother And Next Friend, et al.,

Petitioners,

vs.

BOARD OF EDUCATION FOR COMMUNITY UNIT SCHOOL DISTRICT 187, CAHOKIA, ILLINOIS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONERS.

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OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Illinois is reported at 199 F. Supp. 403. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 305 F. 2d 783.

JURISDICTION.

The judgment of the Court of Appeals was entered July 5, 1962 (R. 31-32). The Petition for Writ of Certiorari was filed in this Court October 3, 1962, and the writ was granted December 10, 1962 (R. 32).

This Court has jurisdiction under 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED.

1. Whether, where plaintiffs sought equitable relief against public school segregation, invoking federal court jurisdiction under the Civil Rights Acts, the court erred in dismissing the case on the ground that plaintiffs must exhaust state administrative remedies before filing a suit.

2. Whether a state procedure requiring a hearing before an official without power to grant relief, who can merely request that the State Attorney General seek relief in a state court, is an inadequate, uncertain and partially judicial procedure which need not be exhausted as a prerequisite to the grant of equitable relief in the federal courts to correct racial segregation in public schools.

3. Whether the court below erred in requiring resort to a procedure inadequate because of its unavailability to individuals who do not obtain the signatures of 50 persons on a complaint to the administrative officials.

STATUTES INVOLVED.

1. This case involves Illinois Revised Statutes, 1961, Chapter 122, Section 22-19, which provides as follows:

> "Sec. 22-19. Upon the filing of a complaint with the Superintendent of Public Instruction, executed in duplicate and subscribed with the names and addresses of at least 50 residents of a school district or 10%, whichever is lesser, alleging that any pupil has been excluded from or segregated in any school on account of his color, race, nationality, religion or religious affiliation, or that any employee of or applicant for employment or assignment with any such school district has been questioned concerning his color, race, nationality, religion or religious affiliation or subjected to discrimination by reason thereof, by or on behalf of the school board of such district, the Superintendent of Public Instruction shall promptly mail a copy of such complaint to the secretary or clerk of such school board.
>
> "The Superintendent of Public Instruction shall fix a date, not less than 20 nor more than 30 days from the date of the filing of such complaint, for a hearing upon the allegations therein. He may also fix a date for hearing whenever he has reason to believe that such discrimination may exist in any school district. Reasonable notice of the time and place of such hearing shall be mailed to the secretary or clerk of the school board and to the first subscriber to such complaint.
>
> "The Superintendent of Public Instruction may designate an assistant to conduct such hearing and receive testimony concerning the situation complained of. The complainants may be represented at such hearing by one of their number or by counsel. Each party shall have the privilege of cross examining witnesses. The Superintendent of Public Instruction or the hearing

officer appointed by him shall have the power to subpoena witnesses, compel their attendance, and require the production of evidence relating to any relevant matter under this Act. Any Circuit or Superior Court of this State, or any judge thereof, either in term time or vacation, upon the application of the Superintendent of Public Instruction or the hearing officer appointed by him, may, in its or his discretion, compel the attendance of witnesses, the production of books, papers, records or memoranda and the giving of testimony before the Superintendent of Public Instruction or the hearing officer appointed by him conducting an investigation or holding a hearing authorized by this Act, by an attachment for contempt, or otherwise, in the same manner as production of evidence may be compelled before said court. The Superintendent of Public Instruction or the hearing officer appointed by him may cause the depositions of witnesses within the State to be taken in the manner prescribed by law for like depositions in civil actions in courts of this State, and to that end compel the attendance of witnesses and the production of books, papers, records and memoranda. All testimony shall be taken under oath administered by the hearing officer, but the formal rules pertaining to evidence in judicial proceedings shall not apply. The Superintendent of Public Instruction shall provide a competent reporter to take notes of all testimony. Either party desiring a transcript of the hearing shall pay for the cost of such transcript. The hearing officer shall report a summary of the testimony to the Superintendent of Public Instruction who shall determine whether the allegations of the complaint are substantially correct. The Superintendent of Public Instruction shall notify both parties of his decision. If he so determines, he shall request the Attorney General to apply to the appropriate circuit court for such injunctive or other relief as may be necessary to rectify the practice complained of.

"The provisions of the 'Administrative Review Act,' approved May 8, 1945, and all amendments and modifications thereof and the rules adopted pursuant thereto shall apply to and govern all proceedings for the judicial review of any final decision rendered by the Superintendent of Public Instruction pursuant to this Section."

2. This case also involves Title 42, United States Code, Section 1983, which provides:

1983. *Civil action for deprivation of rights.*— Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. This case also involves Title 28, United States Code, Section 1343(3):

1343. *Civil rights.*—The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

• • • • •

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

STATEMENT.

This action was commenced in the United States District Court for the Eastern District of Illinois on September 12, 1961, by a group of Negro school children and their parents residing in St. Clair County, Illinois, and attending schools in Community Unit School District No. 187. The complaint named as defendants the Board of Education for Community Unit School District No. 187; the County Superintendent of Schools for St. Clair County, Illinois; and the Superintendent of Schools for School District No. 187.

Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. 1343(3) as authorized by Title 42, U.S.C., §1983 to redress the deprivation of rights secured by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The action was brought pursuant to Federal Rules of Civil Procedure, Rule 23(a)(3) "on behalf of all other Negro children and their parents in Centreville, Illinois who are similarly situated and affected by the policy, practice, custom and usage complained of herein" (R. 3).

Defendants moved to dismiss the complaint; plaintiffs were granted leave to amend the complaint; and the defendants' motion to dismiss was extended to attack the amended complaint (R. 2). The District Court heard arguments on the motion to dismiss October 6, 1961 (R. 2) and on November 24, 1961, entered an order granting defendants' motion and dismissing the amended complaint (R. 15).

Because the case was decided on the pleadings, a detailed description of the amended complaint is necessary. It was alleged that the minor plaintiffs are Negro children attending the public elementary schools in Community Unit School District No. 187 (R. 3) which are under the jurisdiction, management, and control of the several defendants (R. 3); that the questions presented by the action are common to all Negro children in the school district, and that the members of the class plaintiffs represent are so numerous as to make it impracticable to bring them all individually before the court, but that the class was fairly and adequately represented (R. 3-4). It was alleged that the defendants were charged by Illinois law with the duty of maintaining and operating a public school system in District No. 187; that they are presently operating public schools in the area in purported pursuance of said laws; that the defendant school board established and maintained within the District various free schools organized as elementary, junior high and high schools.

It was further alleged that defendants were pursuing a policy, custom and practice for determining the assignment of pupils to the elementary schools in the district generally known as the "neighborhood school policy" or "attendance area policy" by which children are compelled to attend schools in attendance areas where they reside and are not permitted to attend schools in other areas except under special circumstances not applicable to the plaintiffs or the class represented and with certain other exceptions which are described below.

The complaint alleged further that the defendants operate elementary schools known as the Chenot School and and Centreville School and approximately four other schools, each of which had a prescribed attendance area

(R. 5). Plaintiffs alleged that the Chenot School which began operation in 1957, "was planned and built, and its attendance area boundaries were so drawn as to make it an exclusively Negro school in its student enrollment" (R. 5); and that Negroes, including plaintiffs, in the community lived within well-defined geographic areas known as ghettoes which were well known to the defendants at the time the boundaries of the school attendance areas were established (R. 5). It was alleged that as a result of the defendants' adoption and pursuance of the attendance area policy, defendants have created and do maintain racially segregated public elementary schools and that the minor plaintiffs are compelled to attend such a racially segregated school by the defendants (R. 6). In explanation it was asserted that prior to 1957 when the Chenot School was opened, Negro elementary pupils residing in what is now the Chenot attendance area were assigned to the Centreville School; that Negro children were compelled to attend classes at Centreville School exclusively in the afternoon, while white children in the same school attended classes exclusively in the morning, with the exception of certain "slow" white pupils who attended classes throughout the day (R. 6); that when the Chenot School was opened in 1957, "all or practically all the children of elementary school age who resided in the Chenot attendance area were Negroes, a result intentionally achieved by the defendants by the manner in which the Chenot attendance area boundaries are drawn, in pursuance of a plan to make Chenot School an all-Negro school in student enrollment" (R. 6).

It was alleged that since 1957, because of overcrowding in the adjacent Centreville School area, certain fifth and sixth grade classes at the Centreville School were trans-

ferred to Chenot School; that these classes consisted of approximately 97% white and 3% Negro students; and that these classes were maintained intact as separate classes within Chenot School "in pursuance of [defendants'] design to maintain separate and racially segregated educational facilities for Negro school children, or as nearly so separated and segregated as practicable" (R. 6-7). It was alleged that as a result of the foregoing policy during the 1960-61 school year (the one next preceding the filing of the complaint) there were no white children of elementary school age residing in the Chenot attendance area; that the enrollment at the Chenot School consisted of 251 Negro students and 254 white students; that all these white students were in the fifth and sixth grade classes transferred from the Centreville School as described above; that only eight Negro students were in classes with white students (R. 7); that at the Chenot School there were 10 classes with only Negro students, three classes with only white students, and five classes among which eight Negro students were divided along with about 146 white pupils.

It was alleged that except for the eight Negro students at Chenot School who were transferred from Centreville School, all Negro students within the school "attended classes located together in one part of the school building, separate and apart from the white students, and were further compelled to use entrances to and exits from the school building separate from those used by the white students" (R. 8).

It was alleged that the described conditions were continuing and current (R. 8), and that "despite requests, demands and pleas to the defendants to cease and desist" they had failed and refused to desegregate the schools under their jurisdiction and were acting so as to perpetu-

ate the system of segregated schools and facilities contrary to the Constitution of the United States (R. 9); and that the defendants' actions in drawing boundary lines of the attendance area and in "creating and maintaining racially segregated classes and separate educational facilities," and in compelling minor plaintiffs to attend a racially segregated school deprived plaintiffs of the equal protection of the laws and due process of the law as guaranteed by the Fourteenth Amendment (R. 9). It was alleged that the defendants' action caused the plaintiffs irreparable injury which will continue unless defendants are enjoined by the court and that any other relief to which plaintiffs could be remitted "would be attended by such uncertainties and delays as to deny to plaintiffs substantial relief to which they are entitled" (R. 10).

Plaintiffs further alleged that they had not exhausted certain administrative remedies provided by the Illinois law "for the reason that the remedy there provided is inadequate to provide the relief sought" (R. 10).

The complaint prayed for declaratory relief adjudging the defendants' practices at the Chenot School to be in violation of the Fourteenth Amendment and sought an injunction against these same practices. The complaint also requested that the court require the defendants to submit to the court a plan for compliance with "deliberate speed" in order to register the minor plaintiffs in racially integrated public elementary schools, and for any other appropriate relief (R. 11).

The defendants' motion to dismiss asserted that the complaint failed to state a claim upon which relief could be granted stating, *inter alia*, that the plaintiffs have not exhausted procedures under certain Illinois laws, namely, "Section 22-19 of the School Code" (R. 12-13).

The provisions of Ch. 122, §22-19 of the "Illinois School Code of 1961" (enacted in 1961) can be summarized as follows:

If a complaint is filed with the Illinois Superintendent of Public Instruction executed in duplicate by at least 50 residents of a school district or 10%, whichever is lesser, alleging that any pupil "has been excluded from or segregated in any school on account of his color, race, nationality, religion or religious affiliation," or that there has been discrimination with respect to any employee or applicant for employment of a school district on these grounds by or on behalf of any school board, that the Superintendent of Public Instruction shall mail a copy of such complaint to the named school board. (The statute deals only with racial discrimination and with no other type of controversy.) Therefore, the Superintendent of Public Instruction is required to set a date for a hearing on the allegations in the complaint not less than 20 nor more than 30 days after its filing.

It is also provided that the Superintendent may set the date for a hearing "whenever he has reason to believe that such discrimination may exist in any school district." The statute contains provisions for hearings to be conducted by the Superintendent or an assistant, for the parties to be represented by counsel, for parties to have the privilege to cross examine witnesses, and for the Superintendent to have a subpoena power enforceable by the courts. It is also provided that the Superintendent might take depositions as in civil actions and for testimony to be taken under oath and transcribed by a competent reporter.

Following the hearing, the hearing officer is required to "report a summary of the testimony to the Superintendent of Public Instruction who shall determine whether the allegations of the complaint are substantially correct." The statute provides that the "Superintendent of Public Instruction shall notify both parties of his decision." It further provides that if he so determines, the Superintendent "shall request the Attorney General to apply to the appropriate circuit court for such injunctive or other relief as may be necessary to rectify the practice complained of." It should be noted that the statute contains no other provisions for action by the Superintendent of Public Instruction except those just mentioned, e.g., a determination of whether or not the allegations of the complaint are "substantially correct" and a request to the Attorney General to apply for relief in the courts.

The statute also provides that any final decision rendered by the Superintendent of Public Instruction pursuant to this section may be reviewed under the provisions of the "Administrative Review Act" (see Smith-Hurd Ann. Stats. Ch. 110, Sec. 264, et seq.).

Plaintiffs responded to the motion to dismiss asserting, *inter alia*, that plaintiffs' action under 42 U.S.C. §1983 "need not be preceded by the exhaustion of any state remedies"; and that the state remedies referred to by the defendants "are neither administrative, adequate or available to the plaintiffs".

The District Court filed an opinion on November 24, 1961 (R. 16-22), in which it recapitulated the pleadings and proceedings in that court and set forth its reasons for dismissing the complaint. The court stated that it was not deciding whether plaintiffs had been denied equal protec-

tion of the laws but only whether the court could entertain the action in view of the fact that plaintiffs admittedly had not exhausted any state administrative remedies available under Illinois law (R. 22). The court sustained the defendants' motion to dismiss, and ordered the amended complaint dismissed because of plaintiffs' failure to exhaust the "remedy" provided by the Illinois School Code (Smith-Hurd Ann. Stats., Ch. 122 §22-19).

The court rejected plaintiffs' argument that the relevant Illinois statute did not provide an adequate procedure in that the remedy, if any, was judicial rather than administrative, and also rejected plaintiffs' arguments that the remedy was inadequate in that the statute required 50 persons to make a complaint to the Superintendent of Public Instruction, and in that it provided for an action to be brought by the State of Illinois in the Illinois courts. The Court said that the Superintendent of Public Instruction was required by the statute to conduct a hearing to determine the validity of complaints, and that "in all likelihood" plaintiffs would have had "little difficulty in obtaining the number of signatures required" (R. 22).

The court asserted that by ignoring the statute plaintiffs had deprived the State of Illinois of the "opportunity to rectify its own wrong if it is found that one does exist" (R. 22); and held that plaintiffs' "mere assertion" that the administrative remedy was inadequate was insufficient to demonstrate that the remedy was "in fact ineffective to produce the result attempted by the statute and desired herein" (R. 22).

On plaintiffs' appeal the Court of Appeals for the Seventh Circuit affirmed (R. 31-32). The Court of Appeals similarly determined that the action should be dismissed

for failure to exhaust the remedies provided by the Illinois law, and rejected plaintiffs' arguments that under the facts alleged they were not required to exhaust the remedy provided, that the remedy is not administrative but judicial, and that the remedy is inadequate. The Court of Appeals read plaintiffs' complaint as failing to "allege school board policies which are unconstitutional in themselves" (R. 29) and thus asserted that plaintiffs were required to resort to the remedy provided in the Illinois School Code. The Court also found the statute's requirement of 50 signatures not to be unreasonable "since the function of the requirement is similar to that of a class suit, that is, one of convenience and orderly procedure for presentation in a common cause many individual complaints instead of many individual particular causes" (R. 30). The Court also asserted that the statute gave the Superintendent of Public Instruction power to initiate a hearing whenever he has reason to believe discrimination may exist; that plaintiffs had not requested him to initiate such a hearing; and that if in practice "an individual is denied the remedy he may then turn to the federal courts" (R. 30).

Plaintiffs' petition for a writ of certiorari was allowed by an order entered December 10, 1962 (R. 30).

ARGUMENT.

A.

THE EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES IS NOT A PREREQUISITE TO FILING SUIT IN A FEDERAL COURT UNDER THE CIVIL RIGHTS ACT SEEKING DECLARATORY AND INJUNCTIVE RELIEF AGAINST A RACIALLY SEGREGATED PUBLIC SCHOOL SYSTEM.

Petitioners brought this action pursuant to federal civil rights statutes conferring jurisdiction on the United States District Court, 28 U.S.C. §1343(3); 42 U.S.C. §1983.

The complaint asserted that plaintiffs, Negro citizens, were being deprived of rights under the due process and equal protection clauses of the Fourteenth Amendment[1] by defendants, who are state officers and a state agency operating a system of public schools pursuant to state law, in that defendants were deliberately segregating plaintiffs and other Negro children, principally by planning school attendance areas on a racial basis to conform to the boundaries of Negro ghettoes so as to create an all-Negro school area, and by practices designed to segregate Negro from white pupils within the same school building. The complaint alleges other actions and policies which enforce segregation, and that despite demands upon the defendants to abandon these practices the policies were being continued.

Under *Brown* v. *Board of Education*, 347 U.S. 483, and *Cooper* v. *Aaron*, 358 U.S. 1, the complaint plainly states

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[1] Although the complaint did not mention 42 U.S.C. §1981, this statute also provides for the equal rights of citizens and implements the Fourteenth Amendment.

a claim for relief within the jurisdiction of the federal courts. It does not matter that the discrimination was produced by discriminatory official action and not by a law commanding segregation. [2] Indeed, the federal courts will afford a remedy even though a denial of equal treatment is also in defiance of state law. [3]

The District Court seems to have proceeded upon the assumption either that the complaint adequately alleged an unconstitutional practice, or that it was not necessary to decide this issue (R. 18-19; 199 F. Supp. at 403). However, the Court of Appeals' opinion contains language critical of the complaint (R. 28; 305 F. 2d at 785), and a statement that it "does not allege school board policies which are unconstitutional in themselves" (R. 29; 305 F. 2d 786). This criticism had reference to plaintiffs' claim that the defendants had manipulated school attendance areas on a racial basis to establish an all Negro attendance area, and not to the claim of racial segregation of pupils within the Chenot School building, which the opinion does not discuss. With respect to the former claim, the complaint alleged not only that the Chenot School "attendance area boundaries were so drawn as to make it an exclusively Negro school * * *" (R. 5), but also that when the school

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[2] 28 U.S.C. §1343(3) and 42 U.S.C. §1983 are addressed to regulations, customs or usages as well as to statutes and ordinances. Discriminatory administration of a law fair on its face is constitutionally forbidden. *Yick Wo* v. *Hopkins*, 118 U.S. 356.

[3] *Monroe* v. *Pape*, 365 U.S. 167. Illinois has various laws prohibiting racial discrimination in public schools and other public and privately owned facilities: Smith-Hurd Ann. Stats., Ch. 122, §§22-11, 22-12, 10-22.5, 18-12, 34-18, 24-4 and Smith-Hurd Ann. Stats. (Special pamphlet, Criminal Code of 1961), Ch. 38, §§13-1 to 13-4.

was put in operation "all or practically all the children of elementary school age who resided in the Chenot attendance area were Negroes, *a result intentionally achieved by the Defendants* by the manner in which the Chenot attendance boundaries were drawn, *in pursuance of a plan to make Chenot School an all-Negro school in student enrollment*" (R. 6; emphasis supplied); and further that defendants have created and are maintaining racially segregated schools "as a result of the schemes, plans and contrivances of the Defendants in drawing the boundary lines of the attendance areas of the schools" (R. 9). It is submitted that this is fully sufficient to constitute the "short and plain statement of the claim" required by the Federal Rules of Civil Procedure in order to give fair notice of plaintiffs' claim and the grounds upon which it rests. No more "specific facts to support * * * [the] general allegations of discrimination" were required. *Conley* v. *Gibson*, 355 U.S. 41, 47. Obviously a manipulation of school attendance areas on a racial basis violates the principles of *Brown* v. *Board of Education*, 347 U.S. 483. See *Taylor* v. *Board of Education of City of New Rochelle*, 191 F. Supp. 181, 192 (S.D. N.Y. 1961), app. dismissed, 288 F. 2d 600 (2nd Cir. 1961); 195 F. Supp. 231 (S.D. N.Y. 1961); aff'd 294 F. 2d 36 (2nd Cir. 1961), cert. den. 368 U.S. 940 (gerrymandering of school areas); cf. *Wheeler* v. *Durham City Board of Education*, 309 F. 2d 630, 632 (4th Cir. 1962) (dual racial attendance areas) and cases cited therein. Cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339. Similarly, allegations that Negro pupils are intentionally separated by race from white pupils within the Chenot School in separate classrooms, and required, as part of a segregation policy, to use separate entrances to and exits from the building (R. 3) would, if established, justify relief as an infringement of constitutional rights. See, *McLaurin* v. *Oklahoma*

State Regents, 339 U.S. 637; cf. *McCoy* v. *Greensboro City Board of Ed.*, 283 F. 2d 667 (4th Cir. 1960) (separate buildings for Negro and white pupils on single elementary school campus).

Plaintiffs submit that the District Court plainly had jurisdiction and that the complaint adequately alleged racial discrimination by state officials in violation of the Fourteenth Amendment. This being true, it was error for the trial court to dismiss the case because of an alleged failure to exhaust administrative remedies. Petitioners urge in parts B and C of the Argument, *infra*, that the particular procedures available to them are inadequate and need not be exhausted in any event. But, notwithstanding any issue as to adequacy, since the court had jurisdiction of the claim and it was properly alleged that a deprivation of constitutional rights had already occurred and was continuing, the court should have retained jurisdiction rather than dismissing the case. If a court should determine, as a matter of equitable discretion, giving due consideration to the presence or absence of emergency factors, or other matters affecting the balance of equities, that final determination of the claim should be deferred pending pursuit of adequate local procedures (and petitioners contend that this would not have been justified here), then at the very least the court should retain jurisdiction of the case pending such action.

The history of the Civil Rights Act of 1871, upon which jurisdiction here rests, makes it plain that Congress gave the federal courts a primary duty to provide relief for Fourteenth Amendment violations, independent of any state remedies. *Monroe* v. *Pape*, 365 U.S. 167, 183. The opinion below rests upon the contrary assumption that exhaustion of state remedies is jurisdictional and an abso-

lute prerequisite to the exercise of federal judicial powers. This view would result in complete abdication of federal judicial responsibility, depriving petitioners of a federal trial forum completely and remitting them to remedies made available by the state.

Several courts of appeals decisions are in accord with the view that once a claim for relief is stated, the federal courts have the power to proceed to adjudicate the claims before them without requiring exhaustion. See *Borders* v. *Rippy*, 247 F. 2d 268 (5th Cir. 1957); *Carter* v. *School Board of Arlington County*, 182 F. 2d 531 (4th Cir. 1950).(*)

(*) The Circuit Courts have generally recognized that exhaustion is not an absolute requirement, frequently granting relief in various circumstances to parties who had either not completely exhausted administrative remedies or had not sought them at all. See *Mannings* v. *Board of Public Instruction*, 277 F. 2d 370 (5th Cir. 1960); *Northcross* v. *Board of Education*, 302 F. 2d 818 (6th Cir. 1962), cert. den. 370 U.S. 944; *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156 (5th Cir. 1957), cert. den. 354 U.S. 921; *Jackson* v. *Rawdon*, 235 F. 2d 93 (5th Cir. 1956); cert. den. 352 U.S. 925; *Gibson* v. *Board of Public Instruction*, 272 F. 2d 763 (5th Cir. 1959); *Marsh* v. *County School Board of Roanoke County*, 305 F. 2d 94 (4th Cir. 1962); *Green* v. *School Board of City of Roanoke*, 304 F. 2d 118 (4th Cir. 1962); *Jeffers* v. *Whitley*, 309 F. 2d 621 (4th Cir. 1962); *Wheeler* v. *Durham City Board of Education*, 309 F. 2d 630 (4th Cir. 1962); *School Board, etc.* v. *Allen*, 240 F. 2d 59 (4th Cir. 1956); *Bruce* v. *Stilwell*, 206 F. 2d 554 (5th Cir. 1953); *School Bd. of Newport News* v. *Atkins*, 246 F. 2d 325 (4th Cir. 1957); *Holland* v. *Bd. of Pub. Instr.*, 258 F. 2d 730 (5th Cir. 1958); *St. Helena Parish School Bd.* v. *Hall*, 287 F. 2d 376 (5th Cir. 1961); *Romero* v. *Weakley*, 226 F. 2d 399 (9th Cir. 1955) Cf. *Browder* v. *Gale*, 142 F. Supp. 707, Aff'd. Per Curiam 352 U.S. 903.

Even in *Carson* v. *Warlick*, 238 F. 2d 724 (4th Cir. 1956), cert. den. 353 U.S. 910, a case strongly relied upon by the Court below, the plaintiffs had been given an opportunity to exhaust the available remedies and had declined to do so before the case was dismissed. See *Carson* v. *Board of Education*, 227 F. 2d 789 (4th Cir. 1955). In *Parham* v. *Dove*, 271 F. 2d 132 (8th Cir. 1959) and *Mannings* v. *Board of Public Instruction*, 277 F. 2d 370 (5th Cir. 1960), the courts determined that plaintiffs should be granted at least the protection of general injunctive orders against discrimination before being required to submit to administrative procedures.

A similar practice has prevailed in the development of the judicially-created equitable abstention doctrine where this Court has required trial courts to retain jurisdiction over properly stated claims, even where they withheld relief pending the resolution of doubtful issues as to the applicability of state laws. This insures that the courts can exercise their power to protect aggrieved parties while the case develops. *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 179; *Government and Civic Employees Organizing Committee* v. *Windsor*, 353 U.S. 364.

B.

ILLINOIS HAS NOT PROVIDED ANY REASONABLY EXPEDITIOUS, ADEQUATE, OR EFFECTIVE ADMINISTRATIVE REMEDY TO CURE THE DISCRIMINATION ALLEGED BY PETITIONERS TO EXIST.

Petitioners submit that the holdings that Ch. 122, §22-19 of the Illinois School Code of 1961 provides an adequate administrative remedy are erroneous. Neither court below has pointed to any provision of law which gives the Superintendent of Public Instruction power to correct the practices of the local school officials complained of in this case. Section 22-19 conspicuously fails to give the Superintendent of Public Instruction power to make an order of any kind requiring local school officials to take any action or refrain from any action with respect to racial discrimination. The School Code grants to local school boards the power to assign pupils and prohibits them from excluding pupils from schools on the basis of race (Ch. 122, §10-22.5). But with the exception of §22-19, and one other statute also not providing any direct powers, [5] the laws defining the powers and duties of the Superintendent of Public Instruction grant no express authority relating to assigning pupils to schools or correcting racial segregation of pupils. [6]

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[5] The other exception is Ch. 122, §18-12, which provides that the Superintendent not disburse certain state funds to a local board unless he obtains from its clerk or secretary an affidavit that the district is complying with the provisions of Ch. 122, §10-22.5 prohibiting discrimination. There is nothing in either §18-12 or §22-19 to indicate that the Superintendent can withhold these funds if he does receive such an affidavit from the local officials.

[6] The general powers and duties of the Superintendent are set out in Ch. 122, §§2-3 to 2-3.34.

Section 22-19 directly limits the Superintendent to deciding, following a hearing, whether allegations of discrimination "are substantially correct." If he so finds he "shall request the Attorney General to apply to the appropriate circuit court for such injunctive or other relief as may be necessary to rectify the practice complained of." Thus, the only function of the Superintendent is to conduct a hearing, conclude whether a complaint is substantially correct, and request that the State's chief legal officer begin a lawsuit against a school board found to be practicing discrimination. The statute does not authorize the Superintendent to order a local school board to stop such practices or give him any sanctions to enforce such an order. He can merely ask that a lawsuit be filed.

Through this stage of the process contemplated by the statute, it is readily apparent that it is not possible for an aggrieved party to secure any relief. The court below asserted that the Superintendent might "cause an adjustment" of the complaint, but it recognized his lack of power under the School Code (R. 29-30, 305 F. 2d at 786). Perhaps the Court had in mind that the Superintendent might exercise a persuasive influence on local authorities, although §22-19 does not even direct him to make conciliatory efforts. Any prestigious state official or even a private citizen *might* have sufficient influence to persuade the school board to abandon discrimination. This possibility is no substitute for an administrative power to decide and settle disputes.

This statutory proceeding requiring a hearing before a powerless state officer is at least as futile as a plea to an administrative agency stalemated by internal disagreement (*Order of Railway Conductors of America* v. *Swan*, 329 U.S. 520, 524), or a plea to an agency bound to deny

relief because of a controlling regulation of its executive superior (*Waite* v. *Macy*, 246 U.S. 606) or a controlling judicial decision (*Montana Nat. Bank of Billings* v. *Yellowstone County*, 276 U.S. 499, 505). In none of these cases has the Court required exhaustion, recognizing that futile procedures should not be required. In several school segregation cases the Fourth Circuit has refused to require exhaustion of administrative remedies where the agency had a "fixed and definite policy" in opposition to the claim for relief. *School Bd. of City of Newport News* v. *Atkins*, 246 F. 2d 325 (4th Cir. 1957), cert. den. 355 U.S. 855; *School Bd. of City of Charlottesville* v. *Allen*, 240 F. 2d 59 (4th Cir. 1956), cert. den. 353 U.S. 910; *Farley* v. *Turner*, 281 F. 2d 131 (4th Cir. 1960).

This Court's decision in *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 210, furnishes a close precedent for the instant case. The Court refused to require the United States to pursue a process closely analogous to that available here as a prerequisite to an action to restrain violations of the Sherman Act. The asserted remedy consisted of an investigation by the Federal Trade Commission, a recommendation that the offender readjust its business if violations were found, and upon a failure to comply with such recommendations a reference of the matter to the Attorney General for such action as he might deem proper (325 U.S. at 199-200). This court rejected an argument that equity should not interfere in advance of this process saying:

> • • • the only function of the Federal Trade Commission under §5 of the Webb-Pomerene Act is to investigate, recommend and report. It can give no remedy. It can make no controlling finding of law or fact. Its recommendation need not be followed by any court or administrative officer or executive officer. (325 U.S. at 210.)

The present case is equally, if not more, compelling. Under §22-19 the Superintendent can give no remedy, can make no controlling finding of law or fact, is not even authorized to make a recommendation to the offender, and cannot enforce any request that a lawsuit be filed. [7] The court below said that the Superintendent had "no judicial power" and that his findings of fact on the issue of segregation are "not binding in a suit at law or in equity" (R. 30; 305 F. 2d at 786).[8]

The possible procedures which remain after a determination by the Superintendent are all plainly *judicial* in nature. They are also subject to so much doubt, uncertainty, and discretion, as to be inadequate remedies. This is true whether or not the Superintendent finds that the complaint of discrimination is substantially correct.

If the Superintendent does so find, nothing in §22-19 requires the Attorney General to commence a lawsuit.

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[7] In the *U. S. Alkali Export Ass'n.* situation, the Attorney General would presumably follow any eventual F.T.C. recommendation that he file a lawsuit, since he had done so in advance of a recommendation. There can be no similar assumption that the Illinois Attorney General would agree to prosecute petitioners' grievance.

[8] This much of the holding seems plainly correct. The possible effect of the Superintendent's findings in a proceeding by either party under the Illinois Administrative Review Act (Ch. 110, §264, et seq.) to review the Superintendent's decision (to ask or not to ask the Attorney General to file suit) is an entirely different matter. Although, as the discussion below indicates, the Attorney General's authority to bring an action in the circuit courts "for injunctive or other relief" is questionable, there is no reason to believe that the statute contemplates anything other than a conventional lawsuit with ordinary judicial fact-finding methods.

This decision is left to the discretion of the Attorney General. But, even worse, Illinois law leaves substantial doubt as to whether the Attorney General has any power to bring an action capable of rectifying the practices complained of. It is doubtful that §22-19 grants this authority to the Attorney General, as there is no explicit authorization in this statute. Whether an attorney general might find such authority conferred by implication, and the Illinois courts would support him, cannot be forecast. A search of Illinois statutes reveals no other authorization for the Attorney General to bring an injunction suit against a school board.[9] The laws which do give the Attorney General powers with respect to civil rights violations give no hint of any authority to seek injunctive relief against a school board to remedy discrimination.[10]

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[9] Smith-Hurd Ann. Stats. Ch. 14, §4, providing the general duties of the Attorney General, sheds no light on the issue.

[10] Smith-Hurd Ann. Stats. (Special Pamphlet, Criminal Code of 1961), Ch. 38, §§13-1 to 13-4. Presumably the Attorney General could bring *criminal* proceedings against a school official for a violation of civil rights as defined in Ch. 38, §§13-1(c), 13-2(c), 13-3(a). It is also conceivable, though not so clear, that the Attorney General could institute an administrative proceeding (also subject to judicial review) to remove an official from office for a civil rights violation under Ch. 38, §13-3(d). However, the availability of an injunctive remedy pursuant to §13-3(c) is subject to grave doubts. That provision authorizes the Attorney General to bring injunctive proceedings against "places of public accommodation and amusement" (as defined in detail in §13-1(a)), labeling racial discrimination a "public nuisance." But there is no mention of injunctive relief against discrimination by officials, or in governmental institutions, or any places not enumerated in the law.

And, of course, none of the laws indicate that the Attorney General is empowered to bring a suit to protect the federal constitutional rights of an aggrieved person against a state officer, as distinguished from protecting the right to equal treatment under Illinois law.

Notwithstanding the possibility that some such power of the Attorney General might be found somewhere, the state of the law creates grave doubt as to the availability of any judicial remedy. This doubt renders any remedy so uncertain and speculative that petitioners' federal rights can be fully protected only if the District Court exercises its jurisdiction to protect those rights. This conclusion accords with *Hillsborough Township* v. *Cromwell*, 326 U.S. 620, 625, where it was unclear, in part because of possibly conflicting state court decisions, whether a litigant's federal right to nondiscriminatory treatment under state tax laws could be protected in state proceedings. This Court approved the grant of declaratory relief.[11] In the instant case, uncertainty as to the protection of the federal rights is manifest because the Attorney General has discretion to refuse to file a case, and because the statute's lack of clarity beclouds whether such an action may be brought.

More fundamentally, even if a state injunctive remedy were clearly available in a suit by the Attorney General, any such remedy in the "appropriate circuit court" under §22-19 would be judicial, rather than administrative or

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[11] Relief was granted notwithstanding *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, which held that the policy of the "Johnson Act of 1937" (now 28 U.S.C. §1341), prohibiting injunctions against state tax collections if there was a "plain, speedy and efficient remedy" in the state courts, governed the exercise of discretion in declaratory judgment cases involving state taxes.

legislative. This Court often has held that a party may not be required to submit his claim to state judicial remedies where Congress has granted the federal courts jurisdiction. *Lane* v. *Wilson*, 307 U.S. 268, 274-275, applied this principle to the jurisdiction of the federal courts under the civil rights laws.[12] See also *City Bank Farmers Trust Co.* v. *Schnader*, 291 U.S. 24, 30; *Prendergast* v. *New York Telph. Co.*, 262 U.S. 43, 48; *Bacon* v. *Rutland R. Co.*, 232 U.S. 134; *Pacific Teleph. & Teleg. Co.* v. *Kuykendall*, 265 U.S. 196, 200-201; cf. *Prentis* v. *Atlantic Coast Line R. Co.*, 211 U.S. 210, 228. The principle has been applied in school segregation cases by lower federal courts relying on *Lane* v. *Wilson*, *supra*. See, e.g., *Carson* v. *Warlick*, 238 F. 2d 724, 729 (4th Cir. 1956), cert. den. 353 U.S. 910; *Dove* v. *Parham*, 282 F. 2d 256 (8th Cir. 1960).

It would be paradoxical to permit a litigant to ignore state judicial remedies available to him personally, but require him to forego his federal forum in favor of a state court action to be conducted by an official of the same state government which he asserts is infringing his constitutional rights. It might be argued that if an aggrieved person feared to stand aside from the litigation, not trusting prosecution of his rights by state officials, he might seek to intervene in the state court proceedings. This might be possible under the Illinois Civil Practice Act (Smith-Hurd Ann. Stats. Ch. 110, §26.1). Intervention, however, would bar litigation of the same claim in the federal courts. *Grubb* v. *Public Utilities Commission*, 281 U.S. 470; *Detroit & Mackinac R. Co.* v. *Michigan Railroad Comm.*, 235 U.S. 402. Thus Illinois offers petitioners the al-

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[12] Jurisdiction in that case was founded on R.S. §1979, now 42 U.S.C. §1983.

ternatives of standing aside while their claim is litigated by others in the state courts, with the hope that an unfavorable adjudication would not bar their eventual return to the federal forum, or of sacrificing the federal trial forum altogether and seeking intervention in the state court proceedings. A Court of equity should not impose such unsatisfactory alternatives where Congress has plainly granted jurisdiction to vindicate federal constitutional rights.

Of course, if the Superintendent of Public Instruction, having conducted a hearing pursuant to §22-19, refuses to request that the Attorney General file a lawsuit, still another state judicial proceeding is required by the statute, i.e., a judicial review of this decision under Illinois' "Administrative Review Act" (Smith-Hurd Ann. Stats. Ch. 110, §264, et seq.). This lawsuit to require the Superintendent of Public Instruction to ask the Attorney General to bring a lawsuit (which the Attorney General may refuse to bring even if requested) is also clearly a judicial proceeding. This has been expressly decided by the Illinois Supreme Court which has held that the functioning of its courts under the Administrative Review Act does not offend the principle of separation of powers since the proceedings are "essentially judicial in character." *Harrison* v. *Civil Service Commission*, 1 Ill. 2d 137, 115 N.E. 2d 521, 526 (1953).[13] Thus, the rule of *Lane* v. *Wilson*, and the

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[13] In the *Harrison* case, *supra*, the court also said that these are proceedings which have "traditionally been regarded as a judicial function" and that the scope of review was "comparable to the issue at law as to whether there is competent evidence to support a judgment of a lower court." The statute has all the indicia of providing a judicial remedy, including the provisions relating to the

other cases cited above at p. 27, would also apply to this process.

Of course, a school board dissatisfied with a determination by the Superintendent that a complaint against it was "substantially correct" could also appeal to the state court under the "Administrative Review Act" in an attempt to prevent his making a request to the Attorney General. The complainant at the Superintendent's hearing would have to be made a defendant (Ch. 110, §271). The potentials of §22-19 for involving someone whose constitutional rights have been denied in profitless proceedings in which no meaningful relief possibly can be obtained are seemingly infinite.

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(12) *Continued*

scope of review (Ch. 110, §274); providing the power of the trial court (§275); providing for appellate review (§276); governing the pleadings (§267); the service of process (§269); jurisdiction and venue (§268); and the applicability of the Illinois Civil Practice Act (§277).

C.

THE ILLINOIS STATUTE (CH. 122, §22-19) UNREASONABLY CONDITIONS THE COMMENCEMENT OF A PROCEEDING BY REQUIRING AN AGGRIEVED PARTY TO OBTAIN THE SIGNATURES OF 50 PERSONS ON HIS COMPLAINT, THUS FAILING TO GIVE DUE PROTECTION TO PERSONAL CONSTITUTIONAL RIGHTS.

In addition to all the infirmities of §22-19 discussed above, the statute includes a requirement which is completely alien to the accepted principle that Fourteenth Amendment rights are personal to the individual. Section 22-19 provides that the Superintendent "*shall*" hold a hearing if "at least 50 residents of a school district or 10%, whichever is lesser"[14] execute and file a complaint alleging discrimination against "any pupil" or "any employee • • • or applicant for employment." The statute goes on to provide that the Superintendent "*may* also fix a date for a hearing wherever he has reason to believe that such discrimination may exist in any school district" (emphasis supplied).

The court below upheld the 50 signature requirement as "reasonable," commenting that petitioners alleged no unsuccessful effort to obtain 50 signatures or to persuade the Superintendent of Public Instruction to initiate a hearing, and that if the remedy was denied "in practice" to an individual "he may then turn to the Federal Courts" (R. 30; 305 F. 2d at 786).

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[14] The 10% rule would not apply in Community Unit School District No. 187 which has far more than 500 residents. According to the complaint 505 pupils (251 Negroes and 254 whites) attend the Chenot School alone (R. 7).

It is submitted that this engrafts a condition upon the availability of the federal courts to protect constitutional rights which is not reasonable, equitable, or in accordance with the jurisdictional statutes.

First, it is a familiar principle that the right of a pupil to be free from racial segregation or discrimination in public schools is a personal and individual right. This right should not be made to depend upon the desire of other persons to assert their similar rights. *Brown* v. *Board of Education*, 347 U.S. 483; 349 U.S. 294, 300; *Sweatt* v. *Painter*, 339 U.S. 629, 635; *Sipuel* v. *Board of Regents*, 332 U.S. 631, 633; *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337; cf. *McCabe* v. *Atchison T. & S. F. R. Co.*, 235 U.S. 151, 161-162; *Shelley* v. *Kraemer*, 334 U.S. 1, 22; *Oyama* v. *California*, 332 U.S. 633. Nor can the grant of such rights be made legally dependent upon the consent of a community majority such as by an election. *Boson* v. *Rippy*, 285 F. 2d 43, 45 (5th Cir. 1960); *Taylor* v. *Bd. of Ed. of City of New Rochelle*, 191 F. Supp. 181, 197 (S.D. N.Y. 1961); cf. *People* v. *Western Union Telegraph Co.*, 70 Colo. 90, 97-99, 198 Pac. 146, 149 (1921) (holding invalid a provision for review of judicial decisions by referendum). Cf. *Cooper* v. *Aaron*, 358 U.S. 1.

Additionally, Congress has opened the federal courts to suits by *individuals* for the redress of their personal rights under the Fourteenth Amendment, enacting in 28 U.S.C. §1343 that the courts have jurisdiction of civil actions by "any person," and providing for civil liability under 42 U.S.C. §1983 to "any citizen of the United States or other person within the jurisdiction thereof." The right of a single individual to access to the courts is not altered by the fact that he may seek relief broad enough to protect those similarly situated in a class action under Rule

23(a)(3), Federal Rules of Civil Procedure. Rule 23 provides for representation by such members of a class *"one or more,* as will fairly ensure the adequate representation of all" (emphasis supplied).

Compliance or attempted compliance with the fifty signature rule imposes a burden on an individual seeking redress of a constitutional violation far in excess of that required by the applicable federal statutes and rules which allow any individual to proceed alone to protect his rights. The fifty signatures requirement has no rational relationship to the purported function of the proceeding under §22-19 to vindicate the rights of "any pupil". The statute does not represent a legislative judgment that the administrative process be made available only if the rights of many are involved, but merely a judgment that it be made available only if one whose rights are involved can persuade other people to join in a protest against his treatment. The scheme of the statute is not to fix an arbitrary number to secure adequate representation of a class. There is no requirement that all or any of the 50 signers have any grievance involving their own rights. They need not even be parents of pupils in schools. The only requirement is that the signers reside in the school district.

The suggestion by the court below that petitioners should have attempted to persuade the Superintendent to initiate a hearing if they could not obtain 50 signatures does not justify the decision to dismiss the case. The Superintendent plainly had a discretion to grant or deny such a request, there being no reason to believe that the word "may" in the statute really means "must". Since the grant of a hearing without 50 signatures is purely discretionary, no request for it should be required before resort to the courts. This court has applied an analogous principle in

declining to require requests for rehearing of administrative decisions where the grant of rehearing is discretionary and not a matter of right. *Levers* v. *Anderson*, 326 U.S. 219; *Prendergast* v. *New York Tel. Co.*, 262 U.S. 43, 48.

There is additional uncertainty as to the rights of an aggrieved party in any hearing which is initiated by the Superintendent and is not founded upon a complaint meeting the 50 signature requirement. Even the provision in §22-19 for notice of the time and place of the hearing only requires that it be given to "the secretary or clerk of the school board and to the *first subscriber to such complaint*." The phrase "such complaint" would seem to refer only to a complaint filed in accordance with the statutory requirement of 50 signatures as this is the only complaint mentioned in the law. There is a similar statutory failure to specify the rights of an aggrieved person to representation by counsel, cross examination, etc., in a proceeding initiated by the Superintendent of Public Instruction. It is not clear whether one must be a signatory to a complaint meeting the 50 signature requirement in order to be a "party" or a "complainant" and thereby obtain standing at the hearing.

Here again there is "such uncertainty surrounding the adequacy of the state remedy as to justify the District Court in retaining jurisdiction of the cause." *Hillsborough Township* v. *Cromwell*, 326 U.S. 620, 625. In the last mentioned case a part of the state remedy involved was "not a matter of right, but purely discretionary" (*Ibid.*). This was part of the basis for the holding that the remedy was too uncertain and speculative to be "plain, speedy and efficient," and that equity principles did not require exhaustion of the remedy.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgments below should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 480.

LOUIS McNEESE, JR., a Minor, by MABEL McNEESE, His Mother and Next Friend, et al.,
Petitioners,

vs.

BOARD OF EDUCATION FOR COMMUNITY UNIT SCHOOL DISTRICT NO. 187, CAHOKIA, ILLINOIS, et al.,
Respondents.

BRIEF

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Respondents.

BRIEF

For Respondents Board of Education for Community Unit School District No. 187, and Robert F. Catlett.

JURISDICTION.

There is no jurisdiction under Section 1983 as to the respondent Board of Education for the reason that the word "person" in Section 1983 does not include such respondent, upon the authority of **Monroe v. Pape**, 365 U. S. 167, and **Egan v. City of Aurora**, 365 U. S. 514.

QUESTIONS PRESENTED.

As to question number 1 the record does not reflect that the district court required exhaustion of administrative remedies, but only that the petitioners attempt to invoke the state administrative remedy.

Question number 2 also refers to exhaustion rather than attempting to invoke, and argumentatively postulates that the state official is without power to eliminate discrimination, which is not legally correct.

Question number 3 postulates that the district court required recourse to a state administrative procedure requiring 50 signatures when it, of course, required only that the petitioners themselves apply to the state official for his intervention which he is authorized to provide without 50 signatures and not that they obtain 50 signatures on a formal petition.

STATUTES INVOLVED.

This case involves the following statutes of the State of Illinois, in Chapter 122, which is The School Code:

I.

The Superintendent of Public Instruction shall have the powers and duties enumerated in the subsequent sections of this article. Section 2-3. (These include):

A.

To supervise all the public schools in the State. Section 2-3.3.

B.

To advise and assist county superintendents of schools, addressing to them from time to time circular letters relating to the best manner of conducting schools, constructing and furnishing schoolhouses, and examining and procuring competent teachers. Section 2-3.5.

C.

To determine for all types of schools conducted under this Act efficient and adequate standards for the

physical plant, heating, lighting, ventilation, sanitation, safety, equipment and supplies, instruction and teaching, curriculum, library, operation, maintenance, administration and supervision, and to grant certificates of recognition to schools meeting such standards; to determine and establish efficient and adequate standards for approval of credit for courses given and conducted by schools outside of the regular school term; and to determine for junior colleges, as a part of the public common school system, the standards for their establishment and their proper location in relation to existing facilities for general education including preprofessional curricula and for training in occupational activities, and in relation to a factual survey of the possible enrollment, assessed valuation, industrial, business, agricultural and other conditions reflecting educational needs in the area to be served; but provided that no public junior college may be considered as being recognized, nor may the establishment of any public junior college be authorized, in any school district which on the basis of the evidence supplied by the factual survey, shall be deemed inadequate for the maintenance, in accordance with the desirable standards thus determined of a junior college offering the basic subjects of general education, and suitable vocational and semiprofessional curricula terminal in character. However, the establishment of any public junior college shall not be authorized in any school district having a population of less than 10,000 persons and if there is no school district having a population of more than 10,000 persons in the county, there shall not be authorized the establishment of more than one junior college in such county. Section 2-3.25

II.

Boards of Education in addition to the duties enumerated above shall have the additional duties enumerated in sections 10-21.1 through 10-21.5. Section 10-21. (These include):

A.

To establish one or more attendance units within the district. Section 10-21.3.

The school board shall have the powers enumerated in Sections 10-22.1 through 10-22.34. Section 10-22. (These include):

B.

To assign pupils to the several schools in the district; to admit nonresident pupils when it can be done without prejudice to the rights of resident pupils and provide them with any services of the school including transportation; to fix the rates of tuition and other costs including transportation, and to collect and pay the same to the treasurer for the use of the district; but no pupils shall be excluded from or segregated in any such school on account of his color, race or nationality. Section 10-22.5

III.

The school board of each school district shall require teachers, principals, or superintendents to furnish from records kept by them such data as it needs in preparing and certifying to the county superintendent its school district report of claims provided in Sections 18-8 through 18-10 on blanks to be provided by the Superintendent of Public Instruction. The district claim shall be based on the latest available equalized assessed valuation and educational tax rate, shall use the average daily attendance for the

first calendar month of the current school term as determined by the method outlined in Section 18-8, and shall be certified and filed by October 25. Such report shall be accompanied by an affidavit, sworn to by either the superintendent, principal, administrative officer, or a member of the school board, stating that each school operated by such board has complied with the requirements of Sections 27-3, 27-4 and 27-21 in regard to patriotism, American history, and constitutional principles.

Failure on the part of the school board to prepare and certify the school district report of claims for State aid and the accompanying affidavit as required above to the county superintendent by November 1 shall constitute a forfeiture by the district of its right to participate in a distribution of the common school fund for the succeeding year.

The county superintendent of schools shall prepare and certify to the Superintendent of Public Instruction not later than November 15 the county report of claims for State aid upon blanks prepared and furnished by the Superintendent of Public Instruction.

The Superintendent of Public Instruction shall prepare and certify to the Auditor of Public Accounts not later than January 25 the State report of claims for State aid setting forth the amount of money due each county from the common school fund, together with the amount claimed by each city or school district not coming under the provisions of the retirement system created by Article 25.

Amended claims based on attendance for the entire school year ended June 30, or the alternate of 6 months of highest attendance provided in Section 18-8, shall be certified and filed with the county superintendent by July 15 and failure to so file by July 22

shall constitute a forfeiture of the right to file any such amendment of claim; the county superintendent of schools shall certify the county report of amended claims by August 5; and the Superintendent of Public Instruction shall certify the State report of amended claims to the Auditor of Public Accounts by September 15.

No state aid claim may be filed for any district unless the clerk or secretary of the school board executes and files with the Superintendent of Public Instruction, on forms prescribed by him, a sworn statement that the district has complied with the requirements of Section 10-22.5 in regard to the non-segregation of pupils on account of color, creed, race or nationality.

No State aid claim may be filed for any district unless the clerk or secretary of the school board executes and files with the Superintendent of Public Instruction, on forms prescribed by him, a sworn statement that to the best of his knowledge or belief the employing personnel have not discriminated in the employment of teachers on the basis of color, creed, race or nationality. Section 18-12.

IV.

A.

Any school officer or other person who excludes or aids in excluding from the public schools, on account of color, any child who is entitled to the benefits of such school shall be fined not less than $5 nor more than $100. Section 22-11.

B.

Whoever by threat, menace or intimidation prevents any colored child entitled to attend a public

school in this state from attending such school shall be fined not exceeding $25. Section 22-12:

C.

Upon the filing of a complaint with the Superintendent of Public Instruction, executed in duplicate and subscribed with the names and addresses of at least 50 residents of a school district or 10%, whichever is lesser, alleging that any pupil has been excluded from or segregated in any school on account of his color, race, nationality, religion or religious affiliation, or that any employee of or applicant for employment or assignment with any such school district has been questioned concerning his color, race, nationality, religion or religious affiliation or subjected to discrimination by reason thereof, by or on behalf of the school board of such district, the Superintendent of Public Instruction shall promptly mail a copy of such complaint to the secretary or clerk of such school board.

The Superintendent of Public Instruction shall fix a date, not less than 20 nor more than 30 days from the date of the filing of such complaint, for a hearing upon the allegations therein. He may also fix a date for a hearing whenever he has reason to believe that such discrimination may exist in any school district. Reasonable notice of the time and place of such hearing shall be mailed to the secretary or clerk of the school board and to the first subscriber to such complaint.

The Superintendent of Public Instruction may designate an assistant to conduct such hearing and receive testimony concerning the situation complained of. The complainants may be represented at such hearing by one of their number or by counsel. Each party shall have the privilege of cross-examining witnesses. The superintendent of Public Instruction or the hearing

officer appointed by him shall have the power to subpoena witnesses, compel their attendance, and require the production of evidence relating to any relevant matter under this Act. Any Circuit or Superior Court of this State, or any judge thereof, either in term time or vacation, upon the application of the Superintendent of Public Instruction or the hearing officer appointed by him, may, in its or his discretion, compel the attendance of witnesses, the production of books, papers, records or memoranda and the giving of testimony before the Superintendent of Public Instruction or the hearing officer appointed by him conducting an investigation or holding a hearing authorized by this Act, by an attachment for contempt, or otherwise, in the same manner as production of evidence may be compelled before said court. The Superintendent of Public Instruction or the hearing officer appointed by him may cause the depositions of witnesses within the State to be taken in the manner prescribed by law for like depositions in civil actions in courts of this State, and to that end compel the attendance of witnesses and the production of books, papers, records or memoranda. All testimony shall be taken under oath administered by the hearing officer, but the formal rules pertaining to evidence in judicial proceedings shall not apply. The Superintendent of Public Instruction shall provide a competent reporter to take notes of all testimony. Either party desiring a transcript of the hearing shall pay for the cost of such transcript. The hearing officer shall report a summary of the testimony to the Superintendent of Public instruction who shall determine whether the allegations of the complaint are substantially correct. The Superintendent of Public Instruction shall notify both parties of his decision. If he so determines, he shall request the Attorney General

to apply to the appropriate circuit court for such injunctive or other relief as may be necessary to rectify the practice complained of.

The provisions of the "Administrative Review Act", approved May 8, 1945,[1] and all amendments and modifications thereof and the rules adopted pursuant thereto shall apply to and govern all proceedings for the judicial review of any final decision rendered by the Superintendent of Public Instruction pursuant to this Section. Section 22-19.

STATEMENT.

The amended complaint names as defendants, the board of education of School District No. 187, a quasi-municipal corporation, Clarence D. Blair, county superintendent of schools of St. Clair County, in which School District No. 187 is located, and Robert F. Catlett, superintendent of schools of the school district.

The amended complaint contains allegations which consider the defendants largely without respect to their separate functions.

At the district court and court of appeals levels the aspect of the case considered was the suit for injunctive relief against the school district. This is disclosed by the briefs of the parties below and the opinions of the two courts. No more than formal attention was paid to the case against the indvidual respondents.

It may be pointed out that the amended complaint does not attack the constitutionality of Section 10-21.3 of The School Code of Illinois, authorizing a board of education to "establish one or more attendance units within the district".

No evidence has been taken, hence, all of the "facts" in petitioners' Statement are taken from the allegations in petitioners' amended complaint. Even these allegations, it may be noted, relate to school years prior to the one as to which injunctive relief was sought, except for the general allegation that all or substantially all of the facts relating to previous school years continued to exist during the 1961-1962 school year.

ARGUMENT.

In the Case Against the Board of Education.

I.

The Dismissal of the Action Against the Board of Education Was Proper.

There is no jurisdiction under Title 42, U. S. C., 1983, as to the respondent Board of Education.

Although the issue is not raised in the motion to dismiss filed in the district court, the board of education has not answered nor otherwise waived jurisdictional objections, and the question of jurisdiction can be raised at any time. **Mansfield, Coldwater and Lake Michigan Railway Co. v. Swan,** 111 U. S. 379.

The board of education is correctly alleged in paragraph VI of the amended complaint to be "a body politic, organized, existing and operating under and by virtue of Chapter 122, Article 8, Illinois Revised Statutes" (R. 4).

A community unit school district in Illinois is described in the following language of the Supreme Court:

> "A community unit school district, like any other school district established under enabling legislation, is entirely subject to the will of the legislature thereafter. With or without the consent of the inhabitants of a school district, over their protests, even without notice or hearing, the State may take the school facilities in the district, without giving compensation therefor, and vest them in other districts or agencies. The State may hold or manage the facilities directly or indirectly. The area of the district may be contracted or expanded, it may be divided, united in whole or in part with another district, and the dis-

trict may be abolished. All this at the will of the legislature." **People v. Deatherage**, 401 Ill. 25, 31-32, 81 N. E. 581, 586.

In the same year this suit was brought this Court examined Section 1983 in two cases against a city and held specifically that the word "persons" in Section 1983 did not include municipal corporations. **Monroe v. Pape**, 365 Ill. 167, and **Egan v. City of Aurora**, 365 U. S. 514.

The same reasoning forces the conclusion that Section 1983 cannot apply to school districts.

II.

The District Court Properly Held That Petitioners Should Comply With an Adequate State Remedy.

Background.

The Constitution of the State of Illinois makes illegal the segregation of pupils in public schools according to race. Constitution, Article VII, Section 1.

In 1901 the Supreme Court of Illinois in People v. Mayor of Alton, 193 Ill. 309, 312, 61 N. E. 1077, 1078, declared:

> "The complaint of the relator is that his children have been excluded, on account of their color, from the public school of said city located near his residence and been required to attend a school located a mile and a half distant from his residence, established exclusively for colored children. Such complaint is not met by showing that the schools established for colored children in said city equal or surpass in educational facilities the schools established in said city for white children. Under the law the common council of said city had no right to establish different schools for the white children and colored children of said city and to exclude the colored

children from the schools established for white children, even though the schools established for colored children furnished educational facilities equal or superior to those of the schools established for white children".

Section 10-22.5 of The School Code of Illinois provides:

". . . but no pupils shall be excluded from or segregated in any such school on account of his color, race or nationality."

Section 22-11 and Section 22-12 of The School Code provide penalties against school officials and other persons who abridge the rights of colored school children in the following language:

"Any school officer or other person who excludes or aids in excluding from the public schools, on account of color, any child who is entitled to the benefits of such school shall be fined not less than $5 nor more than $100."

"Whoever by threat, menace or intimidation prevents any colored child entitled to attend a public school in this State from attending such school shall be fined not exceeding $25."

These statutes antedate **Brown v. Board of Education**, 347 U. S. 383.

In recent years the legislature, in an effort to implement the policy of the State, has adopted an approach whereby state financial aid is refused to school districts which violate Section 10-22.5. The latest expression of this effort is Section 18-12 of The School Code, which is in part as follows:

"No State aid claim may be filed for any district unless the clerk or secretary of the school board executes and files with the Superintendent of Public

> Instruction, on forms prescribed by him, a sworn statement that the district has complied with the requirements of Section 10-22.5 in regard to the non-segregation of pupils on account of color, creed, race or nationality."

In 1961 the General Assembly provided a further means of effectuating long established state policy by the enactment of Section 22-19 of The School Code. This statute provides for a procedure before the Superintendent of Public Instruction, the highest state school official, for the hearing of a complaint that a pupil had been excluded from or segregated in any school on account of his race. The procedure may be begun by the filing of a complaint signed by at least 50 residents of a school district, or by the Superintendent himself. The Superintendent is to set a date for hearing after reasonable notice to interested parties. The complainants may be represented by counsel. Cross-examination of witnesses is afforded. The power to subpoena witnesses and to produce evidence is given. Depositions of witnesses may be taken. Testimony is to be taken under oath, but the formal rules of evidence are not applied. A stenographic record is to be kept of the testimony.

The Superintendent of Public Instruction is required to determine whether the allegations in the complaint are substantially correct.

The Basic Question.

The basic question before this Court is whether a case under Section 1983 should be conditioned upon the use of an adequate state administrative procedure.

In considering this question two conditions are important to note: inquiry must necessarily go beyond the language of the civil rights act itself, as the doctrine relating

to the use of an administrative procedure is of judicial rather than statutory origin, and the administrative remedy being considered must be assumed to be adequate, as no one contends that an inadequate procedure must be used.

Federal courts have generally required the employment of state procedures before exercising their equity jurisdiction. The rationale employed has been stated by this Court in the following language from two fairly recent opinions.

> "Although a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion, whether its jurisdiction is invoked on the ground of diversity of citizenship or otherwise, 'refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest', for it 'is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.' While many other questions are argued, we find it necessary to decide only one: Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?" **Burford v. Sun Oil Co.**, 319 U. S. 315, 317-318 (1943)

and

> "The rule that a suitor must exhaust his administrative remedies before seeking the extraordinary relief of a court of equity, Goldsmith v. United States Board of Tax Appeals, 270 U. S. 117, 123, 46 S. Ct. 215, 217, 70 L. Ed. 494; Porter v. Investors' Syndicate, supra; Petersen Baking Co. v. Bryan, 290 U. S. 570, 575, 54 S. Ct. 277, 278, 78 L. Ed. 505, 90 A. L. R.

1285; see United States v. Illinois Central R. Co., 291 U. S. 457, 463, 464-466, 54 S. Ct. 471, 474, 78 L. Ed. 909; is of special force when resort is had to the federal courts to restrain the action of state officers, Matthews v. Rodgers, 284 U. S. 521, 525, 526, 52 S. Ct. 217, 220, 76 L. Ed. 447; Porter v. Investors' Syndicate, 286 U. S. 461, 52 S. Ct. 617, 76 L. Ed. 1226; Id., 287 U. S. 346, 53 S. Ct. 132, 77 L. Ed. 354; cf. Central Kentucky Natural Gas Co. v. Railroad Comm., 290 U. S. 264, 271, 54 S. Ct. 154, 157, 78 L. Ed. 307; De Giovanni v. Camden Fire Ins. Ass'n, 296 U. S. 64, 56 S. Ct. 1, 80 L. Ed. 47, and the objection has been taken by the trial court. Matthews v. Rodgers, supra.

"The extent to which a federal court may rightly relax the rule where the order of the administrative body is assailed in its entirety, rests in the sound discretion which guides exercise of equity jurisdiction. Hollis v. Kutz, supra; United States v. Abilene & Southern Ry. Co., 265 U. S. 274, 282, 44 S. Ct. 565, 567, 68 L. Ed. 1016; cf. United States v. Sing Tuck, supra. But there are cogent reasons for requiring resort in the first instance to the administrative tribunal when the particular method by which it has chosen to exercise authority, a matter peculiarly within its competence, is also under attack, for there is the possibility of removal of these issues from the case by modification of its order. Here the commission had authority to pass upon every question raised by the appellant and was able to modify the order. In such circumstances, the trial court is free to withhold its aid entirely until administrative remedies have been exhausted." **Natural Gas Co. v. Slattery**, 302 U. S. 300, 310-11 (1937).

The same principle has been applied in numerous school cases. It has been held repeatedly that administrative remedies provided by state laws, fairly administered, must

be used before federal courts will grant injunctive relief. **Carson v. Board of Education**, 227 F. 2d 789 (4th Cir. 1955); **Carson v. Warlick**, 238 F. 2d 724 (4th Cir. 1956), certiorari denied 355 U. S. 910; **Covington v. Edwards**, 264 F. 2d 780 (4th Cir. 1959); **Holt v. Raleigh City Board of Education**, 265 F. 2d 95 (4th Cir. 1959), certiorari denied 361 U. S. 818; **Parham v. Dove**, 271 F. 2d 132 (8th Cir. 1959); **Shepard v. Board of Education of the City of Engelwood**, 207 F. Supp. 341 (D. C. N. J. 1962).

An attempt was made below by petitioners to establish that cases in the Fifth Circuit did not require the use of an administrative procedure. An individual examination of these cases discloses that this proposition is without basis. In **Mannings v. Board of Public Instruction**, 277 F. 2d 370 (1960), the Pupil Assignment Law of the State of Florida, which was involved, was held to be unconstitutional on its face, so that compliance with its administrative provisions was bound to be futile; in **Borders v. Rippy**, 247 F. 2d 268 (1957), involving schools in Dallas, the only administrative procedures were before the board of education and state commission which were the very bodies which caused the segregation of pupils being complained of; in **Orleans Parish School Board v. Bush**, 242 F. 2d 156 (1957), resort to the administrative remedy provided by the law of Louisiana was held to be "a vain and useless gesture" because the Louisiana constitution and statutes required the separation of white and colored children; in **Gibson v. Board of Public Instruction**, 246 F. 2d 913 (1957), involving schools in Dade County, Florida, local law required segregation; in **Holland v. Board of Public Instruction**, 258 F. 2d 730 (1958), and in **St. Helena Parish School Board v. Hall**, 287 F. 2d 376 (1961), the question of the use of administrative remedies was not at issue; and in **Bruce v. Stilwell**, 206 F. 2d 554 (1953) there was no administrative procedure under the law of Texas for the petitioners to follow.

These cases, as well as other cases which might have been cited which have not required resort to administrative remedies, did not follow the general principle because of factors which are not present in the instant case.

An interesting district court case may be cited. **Shepard v. Board of Education of the City of Englewood**, 207 F. Supp. 341 (1962), decided by the District Court of the District of New Jersey held, on issues practically identical to those raised in the amended complaint in this case, and with a state policy against discrimination, required that the plaintiffs use the administrative remedy provided by the law of the State of New Jersey.

Aside from the considerations expressed in the opinions just quoted, there is the question of whether the rights of the kind here involved may be realized more effectively in federal courts or under adequate state procedures.

In the areas of the United States where **Brown v. Board of Education** is not accepted, and where many state officials including judges are bent on frustrating the right, the Negro school child will not be able to realize his right before state tribunals. In the many other places where **Brown** is law, and in places where, as in the case of Illinois, **Brown** was preceded by state law, the right can be realized before state tribunals. No one would contend that the right of the petitioners can be vindicated only in a federal court.

While courts have some elasticity in their procedures, they are by their nature and tradition agencies for the determination of adversary controversies. They require pleadings. They are accustomed to take evidence in open court and be blind to what the parties do not bring out before them. They give their decisions by orders and judgments, and enforce compliance by means which are effective in the case of individual litigants, but are not always such a simple matter where groups are involved.

The experience of District Judge Kaufman in the New Rochelle school case should be noted. He had before him practically the same issues as are raised in this case. After taking 2,000 pages of testimony he made the point in his opinion that litigation was an unsatisfactory way to resolve the issues presented to him.[1] On several occasions during the taking of testimony the Judge undertook efforts to bring about a settlement. He is reported to have advanced specific settlement proposals in open court.[2] In so doing the Judge undoubtedly felt that his services as a mediator were as important as the historic function of a judge.

Even after making his decision, and after hearing on a plan, the Judge is reported to have felt the need for additional assistance, beyond the record in the case, so that he asked the Attorney General to intervene.[3]

Following the unsatisfactory experience in the district court, to which the opinion referred, there was an appeal to the court of appeals where the matter was again argued and decided,[4] and thereafter there was a petition for certiorari filed with this Court and which was denied.[5]

A federal court can struggle through a New Rochelle case, or even the instant one, but its staggering to think

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[1] "Litigation is an unsatisfactory way of resolving issues such as have been presented here. It is costly, time-consuming . . . causing further delays in the implementation of constitutional rights . . . and further inflames the emotions of the partisans." *Taylor v. Board of Education*, 191 F. Supp. 181, 197 (S. D. N. Y.).

[2] Kaplan "New Rochelle", Civil Rights U. S. A., Public Schools, Cities in the North and West, 1962, Report on the United States Commission on Civil Rights, page 66.

[3] Kaplan "New Rochelle", Civil Rights U. S. A., Public Schools, Cities in the North and West, 1962, Report on the United States Commission on Civil Rights, page 80.

[4] *Taylor v. Board of Education*, 288 F. 2d 600 (2nd Cir. 1961).

[5] 368 U. S. 940 (1961).

of the potential litigation over lines and transfers in the Chicago school district, for example, where respondents understand that a case on similar issues is pending. Moreover, thus far in this brief the type of problem considered has related only to the relatively simple ones relating to lines and transfers. When one gets into more complex areas, such as so-called de facto segregation,[6] or discrimination because of school testing programs, the problems become greater for the courts. When one adds a fluid situation which changes from year to year, and possible intransigence on the part of one of the parties, there is grave doubt that courts can deal effectively with the issues.

Whatever other conclusion one may draw from the New Rochelle experience one cannot doubt that more adequate machinery than the federal courts could provide should be available for the determination of detailed school issues.

Courts doubtless are the proper forum for the evolution of basic principles, in the field of public education, but they are ill prepared to implement policies in specific situations.

It is pertinent to inquire into the possible effect upon the federal courts of a ruling in favor of petitioners, as a decision in favor of petitioners potentially opens to question in the federal courts every attendance unit boundary line in every school district in the nation which has white and Negro students. Future petitioners will not have to preface the filing of their complaints in the district court by any action, even that of requesting the local board of education to take or desist from some action. They will be able to allege on information and belief that a board

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[6] Cf. *Bell v. School City of Gary*, Civil No. 3346, District Court for the Northern District of Indiana, Hammond Division, January 29, 1963.

of education has a policy, or carries on a practice, as a result of which a child suffers the denial of rights under the Fourteenth Amendment. Thereafter the matter is up for judicial determination.

It does not take much knowledge of practical life to realize that if federal courts were opened to this type of suit, few, if any, disagreements over the attendance unit boundary lines, or the transfer of pupils, would be determined at a local level. The tendency would be to go into the district court not only as a court of review of an action of a school board, but also as an arbiter in the first instance.

While the amount of litigation probably would not be so great if the actions were initiated locally the number of suits filed as a result of an organized effort would be limited only by the will of those directing the effort.

The most efficient way to implement the principle laid down in **Brown v. Board of Education** is to permit states which seriously desire to follow it to implement it on a local level.

III.

The School Code of Illinois Provides an Adequate Administrative Remedy.

A fair appraisal of the laws of Illinois reveals that the Superintendent has very great and definite powers to carry out the antisegregation policy of the State of Illinois.

The Superintendent has by Section 2-3.3 of The School Code the power

"... to supervise all the public schools in the state."

The ultimate reach of the authority has not been fully explored, but it is more reasonable to interpret this au-

thority as including power to enforce the State's clear policy on racial segregation than to interpret it as not including such power.

However, the Superintendent's powers are even more specifically given.

By Section 2-3.25 the Superintendent is required to establish standards for the operations of schools and to grant certificates of recognition to schools meeting such standards. Through this power the Superintendent can withhold or revoke the recognition of a school district which he finds guilty of violating a pupil's rights under the Fourteenth Amendment as well as the Constitution and laws of Illinois. Indeed, one cannot imagine the Superintendent recognizing a school district which carries out practices he finds to violate the law.

Still more specific, as respects the problem of segregation, Section 18-12 places a condition upon a school district's ability to receive state financial aid to be in compliance with Section 10-22.5, the second last paragraph of which is as follows:

> "No State aid claim may be filed for any district unless the Clerk or secretary of the school board executes and files with the Superintendent of Public Instruction, on forms prescribed by him, a sworn statement that the district has complied with the requirements of Section 10-22.5 in regard to the non-segregation of pupils on account of color, creed, race or nationality."

As a Superintendent of Public Instruction has a duty to certify claims for State aid to the auditor of public accounts, who issues the checks, he has complete control of these funds. Without state funds the school district, such as the respondent School District, could not operate.

It is inconceivable that a Superintendent of Public Instruction who had found a complaint of segregation to be valid under Section 22-19 would, none the less, certify that school district's claim for State aid. It is absurd to suggest, as petitioners do, that a Superintendent of Public Instruction who had found a school district to be in violation of a law by segregating pupils after hearings pursuant to Section 22-19 would be bound to accept at face value an affidavit of the secretary of the board of education to the effect that no segregation was practiced.

The obvious purpose of the Legislature in enacting that part of Section 18-12 referred to was to put teeth into the anti-discrimination sections of State law.

A Superintendent of Public Instruction who had found that a school district was violating the law by segregating colored pupils from other pupils would undoubtedly direct the school district to correct the situation, and failing compliance would stop state aid or withdraw recognition, or both. These means, with the Superintendent's continuing power of supervision, would bring a noncomplying board of education at once to its knees.

In order to perform any of the acts forcing compliance the Superintendent would be able to act completely on his own. He need not resort to the courts, nor ask the Attorney General of Illinois to do anything.

One can torture the language of the statutes as do the petitioners in their briefs, beyond rational bounds. One can also hypothesize that one official or another would be unfaithful to his oath and sabotage the law. Something more is required to be shown, in this connection, besides the mere possibility, as all men may possibly fail in their duty.

The Requirement of Fifty Signatures.

Petitioners devote a lot of attention to a requirement of Section 22-19 that a proceeding be initiated by a petition bearing the signatures of 50 legal voters. The district court held that it is not too much to require petitioners, before proceeding in a federal court, to show that they cannot obtain fifty signatures.

In any event Section 22-19 authorizes the Superintendent of Public Instruction to initiate a proceeding ". . . whenever he has reason to believe that any such discrimination may exist in any school district".

Respondents are content to rest their case for Section 22-19 and other sections of The School Code on the power of the initiation of a Section 22-19 proceeding by the Superintendent of Public Instruction. If petitioners made a showing that they could not obtain fifty signatures, and if the Superintendent of Public Instruction were to ignore a complaint of segregation reasonable on its face, and failed to initiate a Section 22-19 proceeding respondents would consider that the petitioners had performed as much as they were required to do under Section 22-19.

In the Case Against the Respondent Superintendent of Schools.

It has been pointed out earlier that the case has not involved a consideration of the position of the superintendent of schools, the respondent Robert F. Catlett, aside from the school district. There is, therefore, nothing to review.

It is pointed out that Section 22-19 provides a procedure where there are complaints of segregation "on behalf of the school board", which would include actions of the superintendent of schools, as well as by the school board.

CONCLUSION.

The judgment of the District Court of the United States for the Eastern District of Illinois should be affirmed.

Respectfully submitted,

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